

1 **IN THE UNITED STATES DISTRICT COURT**
2 **MIDDLE DISTRICT OF TENNESSEE**
3 **NASHVILLE DIVISION**

4 **UNITED STATES OF AMERICA**)
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13 **JAMES FREI**)
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23 **BEFORE THE HONORABLE ELI J. RICHARDSON, DISTRICT JUDGE**

24 **TRANSCRIPT OF PROCEEDINGS**
25 **SENTENCING HEARING**

26 **January 13, 2020**

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1 * * *

2 The above-styled cause came on to be heard at 2:24
3 p.m. on January 13, 2020, before the Honorable Eli J.
4 Richardson, District Judge, when the following proceedings
5 were had, to-wit:

6

7 THE COURT: We are here this afternoon in the
8 matter of *United States vs. James Frei*. The case number is
9 3:17-cr-232 [sic].

10 In this case, the Defendant, Mr. Frei, was
11 convicted at a jury trial on each of the eight counts
12 remaining in a nine-count indictment charging him with
13 various events. And, in particular, the jury in this case
14 returned a guilty verdict on February the 14th of this year
15 and found the Defendant guilty of the following counts:

16 1 through 4 each charging production of child
17 pornography in violation of Title 18, United States Code,
18 Section 2251(a).

19 Also Count 5 charging enticement of a minor to
20 engage in sexual conduct in violation of Title 18, United
21 States Code, Section 2422(b).

22 Also finding Mr. Frei guilty of Counts 6 and 7
23 charging him with traveling in interstate commerce for the
24 purpose of engaging in illegal or illicit sexual conduct with
25 a minor in violation of Title 18, United States Code,

1 Section 2423(b) .

2 And also on Count 9, transportation of child
3 pornography in interstate commerce in violation of Title 18,
4 United States Code, Section 2252A(a)(1) .

5 So we are here for sentencing on those counts.

6 And in this case, the Court has reviewed a variety of
7 different documents; and it has, among other things, reviewed
8 the parties' sentencing memorandum, their position regarding
9 the presentence report. Their respective positions regarding
10 the presentence report, we're going to touch on. I don't
11 believe that we have objections to the guidelines calculation
12 but we do have a couple of points that the Defense raised.

13 The Court has reviewed the -- of course, the
14 indictment filed in this case. It's aware of the dismissal
15 of Count 8 as well. It is, of course, familiar with the
16 entire trial proceedings, having adjudicated the trial and
17 presided over it.

18 The Court is also familiar with the stipulation in
19 consent of forfeiture. Forfeiture is something the Court
20 will need to address. The Court is familiar with, also, the
21 written victim impact statement of the minor victim in this
22 case.

23 The Court, thus, is very familiar with the record
24 and is prepared to address sentencing at this time.

25 If Counsel could make their appearances, please.

1 MR. SUEDEKUM: Good afternoon, Your Honor. Chris
2 Suedekum and Katy Risinger for the United States.

3 THE COURT: Good afternoon, Mr. Suedekum.

4 MR. BUCKHOLTS: And Charles Buckholts and Michael
5 Noel here for Mr. Frei.

6 THE COURT: All right. Good afternoon,
7 Mr. Buckholts.

8 We are going to take this hearing in several
9 steps. First, we're going to review the presentence report
10 and address any objections to the report. After we do that,
11 with evidence or argument as needed, we will review the
12 sentencing guidelines and the calculations thereof, and I
13 will rule on the appropriate advisory guideline ranges. Of
14 course, those are advisory only. What is not advisory only
15 are the mandatory minimums, but subject to the mandatory
16 minimums, the Court has the discretion to impose sentence
17 where it sees fit under the applicable Section 3553(a)
18 standards.

19 After ruling on the advisory sentencing ranges, I
20 would consider any motions for a downward departure. There's
21 one issue that is technically in this case styled as a
22 departure, but seems to me it really should be considered
23 more of a sentence adjustment issue under 5K2.23.

24 There is -- also, after that, we'll have a final
25 guideline post-departure set of ranges that are announced.

1 At that point, the Court, viewing the guideline ranges as
2 advisory only, will consider what sentence to impose under
3 Section 3553(a), and the parties are free to introduce
4 evidence and argument as they see fit related to what
5 sentence is appropriate.

6 Mr. Frei also will have the opportunity to address
7 the Court and allocute if he wishes to do so, although he is
8 not required to do so. After these things are done, the
9 Court will discuss the facts of this case as they relate to
10 the appropriate sentencing standards and will pronounce
11 sentence, and then the Court will advise Mr. Frei of his
12 rights to appeal.

13 And the Court, as it says, will start with the
14 presentence report which it has reviewed in full.

15 And I'm going to start by asking you,
16 Mr. Buckholts, whether you have been able to review the
17 presentence investigation report, the PSR as we call it, to
18 your full satisfaction with Mr. Frei together with the
19 addenda to the PSR.

20 MR. BUCKHOLTS: We have, Your Honor. We, on
21 multiple occasions, have gone over it and some of the changes
22 that were suggested, and we have fully reviewed it.

23 THE COURT: All right. Thank you, sir.

24 MR. BUCKHOLTS: Judge, this might make it easier,
25 too. I know one of the issues in there is the restitution.

1 Mr. Frei, we've discussed that with Mr. Frei, and he is in
2 agreement with the restitution amount.

3 THE COURT: Okay. Very well. Thank you.

4 I wanted to then ask you, Mr. Frei, whether you
5 have been able to review the PSR and the addenda to the PSR
6 to your full satisfaction and been able to discuss it with
7 Mr. Noel and Mr. Buckholts to your full satisfaction.

8 THE DEFENDANT: Yeah, Your Honor, we've discussed
9 it on numerous occasions.

10 THE COURT: Very well. Thank you. Are you
11 satisfied with their representation as your attorneys?

12 THE DEFENDANT: Yeah.

13 THE COURT: Any complaints at all about that?

14 THE DEFENDANT: No, sir.

15 THE COURT: Okay. Very well.

16 All right. The Court notes that the Government
17 does not appear to have any objections to the PSR. Is that
18 fair to say, Mr. Suedekum?

19 MR. SUEDEKUM: That's correct.

20 THE COURT: All right. Thank you.

21 So Mr. Buckholts, I see that in the position of
22 the Defendant regarding the PSR, the Defendant has no
23 objections to the statutory ranges that appear stated in the
24 PSR and the sentencing guidelines calculations, but there are
25 a couple of things that the Defendant believes need to be

1 changed. And I'm going to take this as an objection to the
2 use of the information at paragraph 23 for purposes of
3 sentencing.

4 As you have written, Mr. Frei, in response to the
5 footnote of paragraph 23 on page 13, Mr. Frei requests that
6 the first sentence in this footnote state: Mr. Frei disputes
7 the date, the parties involved, and material aspects of the
8 information set forth in this paragraph.

9 And to me, that sounds like what you're saying is,
10 look, paragraph 23, A, it's sort of unproven unless and until
11 the Government has proven it. Mr. Frei does not believe this
12 is accurate. He wants to put the Government to its proof on
13 this particular piece of what's in the PSR.

14 And, of course, there may be trial testimony on
15 this as well, but -- and the Defense is requesting that the
16 Court not rely upon the information in paragraph 23 for
17 purposes of sentencing.

18 Is that what you're saying there?

19 MR. BUCKHOLTS: Yes, Your Honor, discussing to
20 some extent: Some of this information was taken out of a
21 search warrant and some of these statements that Mr. Frei
22 asked us in the footnote to address, we have addressed those.
23 We're not asking for a minitrial or anything over those
24 issues, but he did want his position known, put in the PSR as
25 to those statements in there.

1 THE COURT: Okay. Very well. All right. Thank
2 you.

3 So I want to ask the Government their position on
4 this. And it seems like the Government probably has three
5 different possible approaches here. One is to say, well,
6 look, we're not going to rely on it. We'd ask the Court not
7 to rely on it, and we can move on. That's Option No. 1.

8 Option No. 2 is, you know, Judge, you should be
9 directed to information already of record in this case where
10 there was evidence at trial sufficient to establish these
11 facts by a preponderance of the evidence.

12 Option No. 3 is, well, that hadn't been done yet,
13 but we propose to put on a witness to establish these facts
14 right now.

15 Seems to me those are probably the Government's
16 three options.

17 Mr. Suedekum, what's the Government's take on
18 this?

19 MR. SUEDEKUM: Your Honor -- and I may have
20 printed out the older copy of the PSR. It may be helpful to
21 know specifically to what facts it is the Defendant is
22 disputing. We'll say for the Court's benefit, paragraph 23
23 is largely, if not entirely, based on statements made by the
24 Defendant during a recorded interview at his residence in
25 North Carolina at the time the search warrant was conducted.

1 So it might be helpful to note specifically really what it is
2 Mr. Frei is objecting to and wishes to dispute, because that
3 may factor into how we proceed.

4 THE COURT: All right. So let me put it this way.
5 So -- and, you know, I think Mr. Buckholts probably does it
6 this way to sort of keep his options open and speak more
7 broadly: Mr. Frei disputes the date and the parties involved
8 and material aspects of the information set forth in this
9 paragraph.

10 It's kind of broad, and it does leave open the
11 possibility that, you know, some of this he doesn't really
12 object to. It's very specific things.

13 Can we go even sentence by sentence,
14 Mr. Buckholts, and see what the disagreement is? So, for
15 example, if there's a dispute about the dates and the parties
16 involved, that lends itself to the question, well, does
17 Mr. Frei take the position that, in fact, there were not
18 representatives of the North Carolina State Bureau of
19 Investigation that traveled to his residence? Is it that --
20 you know. So I'm wondering if we should go sentence by
21 sentence.

22 MR. BUCKHOLTS: May I have a moment?

23 THE COURT: Uh-huh.

24 (Respite.)

25 MR. NOEL: May it please the Court, we're trying

1 to look at it line by line.

2 THE COURT: Very well. Should we take a recess?

3 MR. NOEL: I think we've about got it.

4 THE COURT: Okay. Very well. Thank you.

5 (Respite.)

6 THE COURT: All right. What do you think,

7 Mr. Buckholts?

8 MR. BUCKHOLTS: Judge, speaking with the
9 Government, speaking with Mr. Frei on this, in that
10 paragraph, that specific paragraph 23, it looks like there
11 were a couple of -- like, multiple interviews that were
12 conflated. One of those which has caused some of the, you
13 know, the problem and confusion, for instance, in the first
14 sentence, there was an interview where there were no Metro
15 Nashville -- I don't believe -- any Tennessee agents at that
16 time. So some of this is just dealing with the parties
17 involved.

18 So when we responded, the other -- there are some
19 substantive issues. I'm going to try to find the -- the
20 second sentence, I believe, was disputed: Mr. Frei admitting
21 to downloading and trading the child porn for the past ten
22 years, that sentence.

23 The other sentence related -- the next couple of
24 sentences related -- he believes he was talking to them about
25 participating in FarmVille, which is a social media account.

1 Communicating with young minors on the Internet, playing
2 FarmVille. And then also, his account had been hacked.

3 THE COURT: So one moment. So if we do that,
4 on -- and I see the sentence beginning, "During the
5 interview," it looks like Mr. Frei disputes admitting this,
6 right? So the second sentence. Of course, the first
7 sentence, he thinks there's a conflation of multiple
8 interviews and who was present.

9 Second sentence, though, he disputes admitting he
10 downloaded and traded child pornography for the past ten
11 years and admitted to facilitating the e-mail account in
12 order to trade child pornography among other individuals.

13 I believe you're telling me that Mr. Frei disputes
14 that he admitted these things, and he probably also disputes
15 that he did these things. Is that fair to say?

16 MR. BUCKHOLTS: At least that he did those things.
17 I'm just trying to make sure that I'm not mistaken on the
18 conflation of the interviews myself.

19 THE COURT: Why don't we -- does it make sense to
20 take a few minutes? And I want to -- you know, if you tell
21 me, well, it's not necessary, that's fine, we can try and
22 continue. But if it might make sense both for you to figure
23 out kind of just what your client's position is and also for
24 the Government to get ready, based on what the clarification
25 may be as to what it may need to show me if it wants me to

1 rely on this, the Government would have an opportunity to
2 take a few minutes to get its ducks in a row.

3 What do you think?

4 MR. BUCKHOLTS: I think that's fair, Your Honor.

5 THE COURT: Does that make sense to y'all?

6 MR. SUEDEKUM: That's fine, Your Honor.

7 THE COURT: Okay. Because I do think with this
8 objection made, the Court's got to do one of two things:
9 either decide, for one or more reasons, it's not going to
10 rely on this, or look at it and say, this is the kind of
11 thing, if established by a preponderance, I need to rely on.

12 And if the Government is not going to say, Court,
13 we don't think you should rely on it, I have to keep that
14 option open. And so we need to figure out where we are on
15 what is being objected to exactly and whether the Government
16 can prove by a preponderance that those objections should be
17 overruled. Does that make sense?

18 IN UNISON: Yes, Your Honor.

19 THE COURT: Let's take a few minutes, and in a few
20 minutes, we'll have Ms. Jackson come out and see where the
21 parties are on this.

22 (Recess 2:49 p.m. to 2:58 p.m.)

23 THE COURT: All right, Counsel. Where do we stand
24 on paragraph 23?

25 MR. SUEDEKUM: Your Honor, the parties have

1 deferred it, and we've agreed to simply request that
2 paragraph 23 be deleted from the PSR and not be used as a
3 basis for the Court's sentencing decision.

4 THE COURT: All right. Thank you, very much.
5 What we will do is, I will order the probation officer to
6 delete that. The Court understands that the probation
7 officer well may have had a basis, but the Government does
8 not intend to rely on it or intend to establish it by a
9 preponderance here today, and the Court will not rely on
10 those facts, so we will continue. So that's one of the two
11 things that the Defense said in response to the PSR.

12 The other was this: In paragraph 92 on page 29,
13 second line down, here, I was not exactly sure what the issue
14 was. It looks like the Defense has mainly requested that the
15 prosecutor get replaced with: Ms. Womack, open paren,
16 prosecutor, closed paren; is that right?

17 MR. BUCKHOLTS: Yes, Your Honor. And that, just
18 to give a little bit more light on what looks like happened
19 there. Ms. Womack was the actual -- at the time or after his
20 arrest, she brought his son to meet the Defendant. And we
21 put in parentheses "prosecutor" because she was prosecuting
22 the child support case. I know sometimes what we think
23 probably happened was, as it happens in Davidson County
24 oftentimes, they -- a police officer may be listed as a
25 prosecutor, and that's -- so the way it was phrased, it

1 looked like an actual prosecutor.

2 THE COURT: Government official --

3 MR. BUCKHOLTS: Yes.

4 THE COURT: -- when really, it was a private
5 citizen prosecuting their child support action; is that
6 right?

7 MR. BUCKHOLTS: Yes, that's correct.

8 THE COURT: Okay. Now, I wonder if the reference
9 to "with him" should be "with her"?

10 MR. BUCKHOLTS: Yes, Your Honor, it should.
11 That's correct.

12 THE COURT: Okay. Could we agree that we say:
13 "Ms. Womack, the person prosecuting the child support action,
14 brought Defendant's son with her to meet the Defendant."
15 "Brought the Defendant's son with her to meet the Defendant."
16 Would that work?

17 MR. BUCKHOLTS: Yes, Your Honor.

18 THE COURT: Is the Government okay with that?

19 MR. SUEDEKUM: Yes, Your Honor.

20 THE COURT: All right. Thank you. So I will
21 order that change be made as well.

22 Okay. And I believe that there are no other
23 objections from either side; is that right?

24 MR. BUCKHOLTS: That's correct, because as we
25 stated on the restitution, speaking with Mr. Frei, he agrees

1 to that.

2 THE COURT: And I appreciate that. The -- let me
3 ask for the Government's -- the Government's position on
4 restitution. What's the Government specifically asking for?

5 MR. SUEDEKUM: Your Honor, as set forth in the
6 victim impact statement, we are, on behalf of the victim,
7 requesting \$2,080 be ordered in restitution for the
8 Defendant.

9 THE COURT: Okay. And so the Government is -- and
10 I thought this was probably where Mr. Buckholts was going.
11 The Government is requesting specifically what the victim
12 asked for in the written victim impact statement, and the
13 Defense is agreeable to that?

14 MR. SUEDEKUM: Yes, Your Honor. Based on the
15 Defense's agreement to that, the Government is limiting its
16 request to that amount.

17 THE COURT: Okay. Very well. Is that right?

18 MR. BUCKHOLTS: That's correct.

19 THE COURT: Okay. Very well. Thank you for that
20 clarification.

21 Okay. Now, with the changes that we discussed,
22 the Court, absent further objections, will rely upon the
23 presentence report with these changes for purposes of
24 sentencing, and will adopt them based on its independent
25 review and the lack of any further objections, among other

1 things, that we'll adopt the guideline calculations which
2 we'll turn to next.

3 And if we look at the guideline calculations, an
4 important feature of it is the determination that there are
5 four separate groups, and we're going to go one by one.

6 And the Court notes that really, Groups 1 and 2
7 end up with the identical adjusted offense level subtotal
8 that's going to drive this, of 38. But Count 1, Count 5, and
9 Count 6 go into Group No. 1, and that group has an adjusted
10 offense level of 38 because the base offense level under
11 2G2.1(a) is 32. Two levels are added because the offense
12 involved a minor victim who had attained the age of 12 but
13 had not attained the age of 16 years, and she was close to 16
14 but she was not 16, and so that specific offense
15 characteristic is an appropriate two-level addition.

16 There is another two-level addition because the
17 offense involved the commission of a sexual act or sexual
18 conduct, and that is appropriately added.

19 There is yet another two-level upward adjustment
20 because the instant offense involved the use of an
21 interactive computer service to persuade, entice, induce
22 and/or coerce a minor to engage in sexually explicit conduct.
23 So that's what gets us to the adjusted offense total of 38.

24 Now, Group No. 2 consists of Count 2 and Count 7.
25 And the Court notes that here again, under 2G2.1(a), we're

1 dealing with an offense level of 32, and we have the same
2 trio of two-level upward adjustments that we had for our
3 first group of counts. And that gets us to an adjusted
4 offense level for this group of 38.

5 Then we look at Group 3, and Group 3, like
6 Group 4, actually is comprised of a single offense.

7 And by the way, for purposes of clarification, if
8 I did not say that Group 1 consisted of Counts 1, 5, 6, and
9 9, I meant to do that. I might have left off Count 9, but
10 it's got those four counts.

11 But when we return to Group 3, what we see is that
12 we have the sole count of production of child pornography.
13 And again, under 2G2.1(a), that's a base offense level of 32.
14 In this case, though, there's only one two-level upward
15 adjustment, and that's based on the fact that the instant
16 offense involved the use of an interactive computer service
17 to persuade, induce, entice, or coerce a minor to engage in
18 sexually explicit conduct. So we have an adjusted subtotal
19 of 34 for that single count group.

20 Our final group is another single count group. It
21 includes only Count 4, production of child pornography. And
22 the guideline calculations for that are the same as they were
23 for the group in -- excuse me -- as they were for the count
24 in Group 3. In other words, both of those single-count
25 groups involve production of child pornography. Each of them

1 involves a base offense level of 32 and a single two-level
2 upward adjustment under USSG 2G2.1(b)(6)(B).

3 So again, as with Group 3, Group 4 has an adjusted
4 subtotal of 34.

5 Now, this is a case where we assign units under
6 USSG 3D1.4(a), and as it turns out, Count -- the -- well,
7 Group 1 and Group 2 have the highest adjusted offense level,
8 and the offense level for them is 38. Groups 3 and 4 are
9 close enough to that offense level, because they're each 34,
10 that they also constitute a unit. So we have a unit for
11 Group 1, a unit for Group 2, a unit for Group 3, a unit for
12 Group 4. So we have a total number of units of four.

13 And that means we take our adjusted offense level
14 subtotal from above. That's the highest. That's 38. We add
15 four levels because there are four units. That gets us to an
16 adjusted offense level of 42.

17 So then in this case, we are also looking at a
18 chapter for enhancement, and I think it's fair to say that
19 this is an enhancement that the Defense does not believe is
20 improperly applied under the guidelines but is of
21 questionable relevance, in the Defense view, in the 3553(a)
22 analysis, and results in an excessive guideline range. I
23 think that's where the Defense position is on this.

24 But this Chapter 4 enhancement is set forth in
25 paragraph 68, and I'm just going to read it because it is

1 significant. What 68 says is: USSG Section 4B1.5(b) states
2 that: In any case in which the defendant's instant offense
3 of conviction is a covered sex crime, neither USSG
4 Section 4B1.1 nor USSG 4B1.5(a) applies, and the Defendant
5 engaged in a pattern of activity involving prohibited sexual
6 conduct, then the offense level shall be 5 plus the offense
7 level determined under Chapters 2 and 3 of the Guidelines
8 Manual.

9 And in essence, what we're saying here is that
10 there's five levels on top of the 42 levels because the
11 Defendant is deemed to have engaged in a pattern of sexual
12 activity as defined in Application Note 4(B)(i) to USSG
13 4B1.5.

14 That five-level enhancement is not disputed. That
15 gets us to an offense level of 47. But as the Government has
16 noted and the PSR correctly notes, there is a cap at
17 Level 43. The level prior -- the level would be 47 except
18 it's capped at 43. We are significantly not dealing with a
19 downward adjustment for acceptance of responsibility because
20 the Defendant exercised his right to trial as was his right,
21 and we don't punish Mr. Frei for doing so.

22 Instead, the issue is whether he is given an
23 adjustment because he accepted responsibility. The answer to
24 that question is no, it's not the same as punishing him for
25 exercising his right to trial, however. So that gives us a

1 final offense level of 43.

2 Now, the way the PSR has set out the criminal
3 history category, we can see clearly the situation. There
4 are a couple of -- there were a couple of sentences that
5 Mr. Frei had from 1986 that resulted in probationary
6 sentences. Unfortunately, there were violations of probation
7 that occurred as well, but the offenses are old enough that
8 those offenses do not contribute any criminal history points
9 here.

10 In 2000, we see that there was a conviction for
11 accosting children for immoral purposes. That may be
12 relevant background for 3553(a) purposes, but it does not
13 result in any points for a criminal history category here
14 based on the age of the conviction. Then -- which is good to
15 see.

16 There were no convictions until 2016 when there
17 was a conviction in North Carolina State Court for conduct
18 that is -- relevant conduct to the instant offense.

19 Do I understand correctly it's everyone's
20 understanding that we probably had about ten months served in
21 incarceration for which BOP is unlikely to give credit? Am I
22 reading that or understanding that correctly, Mr. Buckholts?

23 MR. BUCKHOLTS: Let me double-check. I believe
24 you're correct. I just want to double-check, Your Honor.

25 Yes. Yeah, almost -- it would be probably about

1 12 months, maybe.

2 THE COURT: Maybe 12?

3 MR. BUCKHOLTS: Is that -- let me double-check.

4 Yes, Your Honor you're correct. I was doing the
5 math wrong.

6 THE COURT: I think that that's -- I think that
7 that's right. Sort of August -- beginning of August,
8 beginning of June; is that right?

9 MR. SUEDEKUM: Yes, Your Honor, approximately
10 eight months.

11 THE COURT: All right. And would the Government
12 concede that this kind of thing where we have a discharge
13 sentence for which the Government would not believe BOP would
14 afford any sentencing credit -- is the Government with me so
15 far on that point? BOP's not going to award sentencing
16 credit on this for this --

17 MR. SUEDEKUM: I think that's correct, Your Honor,
18 yes.

19 THE COURT: Okay. And on this issue, and it's --
20 you know, it's interesting because it's written as a
21 departure issue under the guidelines, but unlike the case for
22 undischarged sentences, the provision for discharge terms of
23 imprisonment strangely enough sort of treats this as a
24 downward departure issue rather than a sentence reduction
25 issue.

1 So what I want to say is, under 5K2.23, the Court
2 believes that although this is guideline policy statement
3 stuff only, a downward departure may be appropriate under
4 these circumstances. The Court, realizing that technically,
5 it's written as a downward departure issue, believes that it
6 would be appropriate to afford, in fact, a reduction in the
7 sentence based on 5K2.23.

8 Does anyone disagree with that approach?

9 MR. BUCKHOLTS: No, Your Honor.

10 MR. SUEDEKUM: Your Honor, I understand the
11 Court's perspective on this. I would note, the conduct that
12 was punished in the North Carolina conviction, there's really
13 only a very small amount of overlap. The images that were
14 involved in the child exploitation charges there largely did
15 not relate to the same victim, as in our case. If I remember
16 right, it is for . . .

17 THE COURT: All right. So based on, you know,
18 these various images found on the phone that were of other
19 individuals --

20 MR. SUEDEKUM: Yes, Your Honor. And candidly,
21 until reviewing the PSR, I had been under the impression that
22 all of the charges in North Carolina did not involve
23 Miss Bushong, and so I think that those sentences all ran
24 concurrently. And so if you factor in the other images being
25 found, I think the Defendant would have received the same

1 sentence even apart from the conduct relating to
2 Miss Bushong. But I understand what the Court's concern is.

3 THE COURT: Okay. So let me ask you this,
4 Mr. Buckholts. Does that sound right to you? Because, you
5 know, I don't want to implicate 5K2.23 if the conviction in
6 North Carolina is not or would not have been within the scope
7 of 5G1.3 because it's really not relevant conduct to this
8 offense.

9 MR. BUCKHOLTS: This -- we disagree with the
10 Government's assertion that it's not related. It's our -- in
11 fact, some of it was related.

12 THE COURT: Let me ask you this, if the parties
13 know: So we have third-degree sexual exploitation of a
14 minor. Anyone know whether we're talking about our same
15 minor victim in this case?

16 MR. BUCKHOLTS: Judge, if I could, on -- this is
17 on page 25 on paragraph 75, if you look on the last paragraph
18 on -- last paragraph of paragraph 75 -- I know that's a
19 little -- T.B. is identified as one of the counts on there.

20 THE COURT: So that presumably is -- yes, the
21 reference here is to "Our T.B.", "Our victim, T.B." Is that
22 fair to say?

23 MR. BUCKHOLTS: Yes.

24 MR. SUEDEKUM: Yes, that's what the PSR says.

25 And, Your Honor, I want to clarify something I

1 said a moment ago. The sentences on those four different
2 warrants were six months' custody to be served consecutively
3 on each, it appears.

4 THE COURT: Consecutively, which is --

5 MR. SUEDEKUM: And so, Your Honor, just going
6 through the individual charges that are listed, the first is
7 a minor female who is 10 to 11 years old. The second, a
8 minor female who is 3 to 4 years old. The third, a minor
9 female who is 3 to 4 years old. It's only the fourth charge
10 that relates to the victim in our case.

11 And Your Honor, I would submit that that would be,
12 at most -- that if the Court were inclined to be concerned
13 about the discharge term of imprisonment, it would be, at
14 most, the six months, assuming that the six months related to
15 our case. The other up to 18 additional months would have
16 related to unrelated conduct, Your Honor.

17 THE COURT: Okay. All right.

18 Now, I can see it looks like there are -- yeah, I
19 guess it's laid out that there are various other victims.
20 And if you look at the situation, the situation with the
21 victim in our case is part of it, but only one part.

22 Anything else on that point? The Court will have
23 this situation in mind when it pronounces sentence. Anything
24 else that you had?

25 MR. BUCKHOLTS: No, Your Honor.

1 THE COURT: All right. Thank you. So I
2 appreciate that.

3 Now, what I want to do is ask this: I had brought
4 that up because it is actually sort of listed -- again, kind
5 of strange manner -- as a departure issue when really it
6 probably should be a sentencing credit issue and identified
7 as such in the guidelines, just like 5G1.31 is -- excuse
8 me -- 5G1.3 is.

9 But that leads to the next question. Are there
10 any other departure issues? In other words, either side have
11 a downward departure motion? I'm not aware of any.

12 Mr. Suedekum?

13 MR. SUEDEKUM: No, Your Honor.

14 MR. BUCKHOLTS: No, Your Honor.

15 THE COURT: Okay. All right. So here's what I'm
16 going to do then. Absent downward departure motions, we have
17 the same predeparture and post-departure guideline ranges,
18 and they are as follows: The guideline provision for custody
19 is a sentence of life in prison.

20 Now, the Court is aware of the statutory mandatory
21 minimums where they apply. It's aware of the statutory
22 maximums for each count. There is one count that does
23 authorize life in prison, only one, but there is one. The
24 guideline provision is life even though, on seven of the
25 eight counts of conviction, a life sentence would not be

1 authorized as a matter of statute.

2 We look at the guideline range for a term of
3 supervised release. As with the statute, the guideline
4 provision calls for a term of supervised release of a
5 mandatory minimum of five years up to life. So the mandatory
6 minimum by statute is five years, the maximum is life. The
7 guideline range is also five to life.

8 Probation is not a possibility either under the
9 statute or according to the advisory guideline provisions.
10 But statutorily, that's just not a possibility anyway.

11 Our fine range is from \$50,000 to \$250,000.
12 Restitution, in a case like this, is as determined by the
13 Court, and the Court believes that it has received an
14 agreement between the parties that the amount of restitution
15 should be ordered in the amount of \$2500 to T.B.

16 But the guideline provision is that it's something
17 to be determined in the discretion of the Court. Special
18 assessment of \$800 is mandated by statute and also called for
19 by the guidelines.

20 In this case, under the guidelines, the JVTA
21 assessment is not applicable because of the indigent status
22 of the Defendant. It would be \$5,000 if the Defendant was
23 not indigent.

24 So those are the guideline ranges in this case.

25 Are there any objections to the guideline ranges

1 as just pronounced?

2 MR. SUEDEKUM: No, Your Honor.

3 MR. BUCKHOLTS: None to the guideline ranges, Your
4 Honor. I thought you said 2500 on the restitution? I think
5 it was \$2,080.

6 THE COURT: Oh, I thought I said 2,050. Is it
7 2,080?

8 MR. BUCKHOLTS: 2,080, yes, Your Honor.

9 THE COURT: All right. So when the time comes for
10 that, I stand corrected. 2,080. Okay. Thank you.

11 Now, the Court notes that obviously, both in terms
12 of mandatory minimum sentences here -- and the largest
13 mandatory minimum sentence we have is 15 years -- and the
14 largest maximum penalty of life imprisonment, you know, the
15 mandatory minimum and the life imprisonment maximum, we're
16 dealing with very significant sentences.

17 The Court realizes that the guideline provision is
18 for a term of life, but the Court, under 3553(a), depending
19 on the application of the applicable sentencing standard,
20 could impose sentence anywhere between 15 years up to life.
21 And it's the Court's job to pronounce a sentence that is
22 sufficient but not greater than necessary to serve the
23 recognized purposes of federal sentencing, and so if it's, in
24 the Court's judgment, 15 years or lower, we'd be looking at
25 15 years. If the Court were to determine that the

1 appropriate sentence was life, then the Court's duty would be
2 to impose a sentence of life. But it does realize that the
3 guideline sentence of life is advisory only.

4 The Court, in applying the sentencing standard of
5 3553(a), needs to consider a variety of facts and
6 circumstances including the nature and circumstances of the
7 offenses of conviction, the history and characteristics of
8 the Defendant, the need for the sentence imposed to do
9 certain things: reflect the seriousness of the offense,
10 promote respect for the law, provide just punishment for the
11 offense, afford adequate deterrence, protect the public from
12 further crimes of the Defendant, provide the Defendant with
13 needed educational or vocational training, medical care, or
14 other correctional treatment in the most effective manner.

15 The Court also needs to consider the kinds of
16 sentences available. And here, that means a couple of
17 different things. One, the Court is not faced with a
18 decision it sometimes has, whether to go with a probationary
19 sentence, because that's not an option; but it is faced with
20 the option of life imprisonment versus a term of imprisonment
21 of 15 years or more. The Court is aware of that.

22 The Court is aware of the need to consider
23 pertinent policy statements from the Sentencing Commission.
24 5K2.23 is one that comes to mind as a pertinent policy
25 statement.

1 The Court needs to consider the need to avoid
2 unwarranted sentencing disparities amongst Defendants with
3 similar records who have been found guilty of similar
4 conduct, and the Court will have that in mind, understanding
5 that it's not always possible to identify perfectly similar
6 cases.

7 But there are ways to consider this Defendant as
8 falling into a certain criminal history category the same as
9 other Defendants, and having been found of the same general
10 category of criminal conduct. The Court, at least, can do
11 that.

12 The Court also needs to consider the need to
13 provide restitution to any victims and intends to do so with
14 what is essentially a stipulated order of restitution.

15 So the Court has all these things in mind. It has
16 also, in addition to reviewing the parties' briefing in some
17 detail, it has done some of its own homework related to what
18 kind of sentences we're seeing out there for these kinds of
19 offenses. And I'm intending to talk about that in some
20 detail. That is part of the Court's analysis.

21 So I'm going to start by asking the parties
22 whether they wish to offer any evidence. Mr. Suedekum, any
23 evidence from the Government?

24 MR. SUEDEKUM: No, Your Honor.

25 THE COURT: All right. Thank you. Mr. Buckholts?

1 MR. BUCKHOLTS: No, Your Honor.

2 THE COURT: Okay. So that gets us to the point
3 where it's time for counsel to make their remarks in addition
4 to whatever they said in their filings. They may say what
5 they wish here. I will say it's this Court's practice to
6 allow a Defendant who wishes to allocute to do so either
7 before or after counsel argue.

8 Mr. Buckholts, does Mr. Frei have a preference?

9 MR. BUCKHOLTS: Your Honor, he would like to
10 allocute, but I would like to make some statements before and
11 maybe a few after he allocutes, if necessary.

12 THE COURT: All right. Thank you, Mr. Buckholts.

13 All right. So here's how we'll proceed then.
14 Mr. Suedekum or Ms. Risinger may go first, then Mr. Buckholts
15 can make his remarks, then Mr. Frei can allocute. If
16 Mr. Buckholts wishes to follow up, he may do so. If he does,
17 then the Government may make any remarks it feels fit to make
18 within the scope of Mr. Buckholts' last comments. All right?

19 MR. SUEDEKUM: Thank you, Your Honor. I know this
20 was included as a part of the presentence report, but I do
21 want to, on behalf of the victim, read her victim impact
22 statement into the record since she's not here today.

23 THE COURT: Sure.

24 MR. SUEDEKUM: (As read): Your Honor, what had
25 happened to me affected me emotionally in a few ways that I

1 didn't realize it would affect me so much: the consistency of
2 having panic attacks or getting really anxious because of
3 small trigger factors that would make me think back to what
4 happened; the noise of thunder or being near a park, for
5 example, would make me think of this; or just sitting there
6 alone by myself and just thinking about it would easily cause
7 me to start panicking. And it had gotten to a point where it
8 was affecting me in my classes, that I would have to leave
9 and go sit in a counselor's office until I was calm.

10 I would start having nightmares at night. It
11 would cause me to wake up shaking and crying and not being
12 able to go back to sleep or make it hard to fall back asleep
13 because of how I was feeling. The panic attacks, being
14 anxious constantly, the nightmares, all combined together
15 because of one thing that had happened to me, just started
16 making things difficult or exhausting; consistently being
17 stressed all the time about it, just wishing that it would
18 all just go away instead of partly taking control of things.

19 I would also like to request some sort of
20 restitution in this matter for my future counseling: \$40
21 co-pay each week for a year for a total of \$2,080. I hope
22 you can consider this.

23 Thank you, Taylor Bushong.

24 Your Honor, I'm not sure whether Miss Bushong has
25 gotten any counseling up to this point. But I would submit

1 that victim impact statement, I'm not sure that she has
2 really even fully begun to be able to process or deal with
3 the trauma that the Defendant's actions have caused her and
4 the long-term effects that she is going to feel as a result
5 of this case. And I know that the Court was able to observe
6 Miss Bushong's testimony during trial and was able to observe
7 her. And I -- sorry, Your Honor.

8 THE COURT: Take your time.

9 MR. SUEDEKUM: I do want to talk for a minute
10 about the Defendant's argument requesting a variance
11 regarding the five-level enhancement for a repeat offender.
12 And specifically, I want to address the *Bruffy* case that the
13 Defense argues was a basis for considering a downward
14 variance. And in comparing the trauma and impact to
15 Miss Bushong as well as just comparing it to the facts of the
16 *Bruffy* case, I thought it was interesting. I don't know if
17 the Court had an opportunity to review the *Bruffy* case.

18 In that case, Your Honor, the Court believed that
19 the repeat offender enhancement overstated the Defendant's
20 conduct, and it actually granted him a variance back down but
21 ultimately still sentenced him to 23 years in prison. And as
22 I reviewed the facts of that case, Your Honor, I couldn't
23 help but notice the stark difference between the factual
24 basis that led to Mr. Bruffy receiving a 23-year sentence and
25 the conduct of the Defendant in this case.

1 In the *Bruffy* case, Your Honor, the Defendant pled
2 guilty. There was no trial. He accepted responsibility for
3 his actions. As the Court noted, there was no sexual
4 intercourse or sexual contact with the victims. There were
5 only two counts of possession of child pornography. Both
6 counts involved the victims who were unaware that videos were
7 being taken of them. The Court noted that those images were
8 not distributed and that as far as the Court was able to
9 determine, it did not appear there was any trauma to either
10 of the victims in that case.

11 Your Honor, with respect to each of those factors
12 which the Court found significant in *Bruffy*, I can't help but
13 notice the stark contrast to the facts of the case here. In
14 this case, Miss Bushong was obviously aware. She was a
15 participant in the conduct Mr. Frei had her engage in. She
16 wasn't asleep.

17 I believe she has been traumatized by this. She
18 talked about in her statement the effects that she has
19 already felt and her need for counseling in the future.

20 As set forth in our memorandum, there is evidence
21 that those images of Miss Bushong were distributed. The
22 Defendant, in speaking with detectives when he -- when his
23 home was searched as well as through the course of the
24 investigation, there was evidence that the Defendant
25 distributed images both of Miss Bushong and possibly of

1 others.

2 And so, Your Honor, on behalf of the Government,
3 we don't believe it's appropriate to grant a downward
4 variance, really for two reasons. First, because the
5 Defendant's conduct did involve repeated acts of sexual
6 exploitation. And the Defense's comment was that it's over a
7 fairly limited time period and only involved one victim. But
8 they acknowledge that the enhancement, on its face, applied.

9 And while this conduct may have only spanned
10 approximately one month, it is really undisputable that there
11 were separate instances, initially just simply by reaching
12 out to and beginning the grooming process of Miss Bushong
13 online, but there were multiple trips, multiple distinct
14 trips beginning on May 8th and spanning up to at least a
15 month later into early June, at least three trips which the
16 Defendant was charged and convicted of traveling from North
17 Carolina to Tennessee and, on each of those occasions,
18 engaging in sexual contact and/or taking photographs and
19 videos of those images. And so we do believe that that
20 enhancement is properly applied.

21 Same argument is true for the -- the Defendant's
22 same argument regarding the grouping, the additional levels
23 added for grouping. These are based on a proper application
24 of the guidelines. Enhancements are warranted in this case.
25 And we do believe, Your Honor, we requested a sentence of

1 life imprisonment because it is the guideline sentence in
2 this case. In fact, as we noted and the Court noted as well,
3 Mr. Frei's offense level is actually higher than a 43, but
4 the guidelines simply do not contemplate a higher offense
5 level, and I think that speaks to the severity and the
6 pervasiveness of his conduct.

7 And so we do believe that a life sentence is
8 appropriate in this case to reflect his actions, the impact
9 that his actions have had upon the victim, and are especially
10 warranted in this case, Your Honor, to provide for deterrence
11 both to the Defendant as well as more generally to other
12 individuals who might seek to take advantage of vulnerable
13 individuals like Miss Bushong.

14 These laws exist for a reason, Your Honor. It's
15 not hard to understand the need to protect vulnerable
16 populations, especially children, from this type of conduct.

17 Again, as the Court is well aware from sitting
18 through the trial, this was not simply a situation where
19 Mr. Frei was in possession of child pornography. And even
20 possessing child pornography itself is a serious crime. But
21 the Defendant's the one who produced the child pornography in
22 this case. He's the one that enticed Miss Bushong to let him
23 travel to meet with her. He's the one that created these
24 images and then preserved them on his phone.

25 And there was also evidence that the Court heard

1 that the Defendant continued to re-access this material and
2 was taking additional screenshots of the videos he had
3 previously created.

4 I think, as -- it's really set forth in the PSR,
5 but this, again, goes to the Defendant's characteristics, his
6 mind-set, his attraction to and interest in minors like the
7 victim in this case. And so for all those reasons, Your
8 Honor, we do request a sentence of life imprisonment.

9 THE COURT: Let me ask you a couple of things,
10 Mr. Suedekum. One is, you know, on the -- on the issue of
11 the four-level enhancement for the units, multi-count
12 adjustment, and the five levels under 4B1.5(b), is there an
13 argument to be made that really, both of them get at the same
14 problem, which is that there is, in the words of the *Brattain*
15 case from the Sixth Circuit cited in 2008: To make sure that
16 a sentence adequately takes account of the frequent
17 occurrence of repeated sexual abuse against a single child
18 victim and the severity of the harm to such victims from the
19 repeated use.

20 It does seem to me the argument can be made, look,
21 the only reason you have the multi-count adjustment is these
22 different counts are picking up different instances. That's
23 why you have the four-level adjustment. And in that sense,
24 it's not the five-level based on the same policy rationale,
25 sort of double accounting for a single concern.

1 MR. SUEDEKUM: Well, Your Honor, I think they
2 both -- they're both certainly related to one another. I
3 think that's really beyond dispute. What I would note is
4 that the grouping and the additional units is based on the
5 counts of conviction and based on the Sentencing Commission's
6 belief that where someone is convicted of one crime and
7 someone who is convicted of three crimes, that the guidelines
8 should take account of the fact that an individual has
9 committed more than one crime when they are being sentenced.

10 I do think that the separate enhancement under
11 4B1.5 addresses a slightly different issue and that it is
12 addressing someone not only who has committed crimes but is
13 repeatedly targeting specifically, in this case, a vulnerable
14 individual or, in other cases, perhaps multiple victims.

15 In looking at the *Brattain* case, the Court was
16 careful to note -- the Sixth Circuit was careful to note that
17 the District Court had actually erred in not applying the
18 enhancement because if the factual circumstances are met, as
19 they are here, that it is appropriate to apply that
20 enhancement.

21 Now, if the Court wanted to consider the
22 application of the two of those guideline provisions jointly
23 as to how they impact the Defendant's guideline range, I
24 would submit, Your Honor, that because the Defendant's total
25 offense level is a 47 and it is being reduced back to a 43

1 for purposes of a guideline range, he's really not suffering
2 or being punished twice in any event because the full effect
3 of those guidelines aren't even being applied to him simply
4 because his guideline range is already so high.

5 THE COURT: Let's say you had 47 minus the 5.
6 Let's say if you did, and if you were the Court, of course,
7 the guideline offense level is 43, which is life. But if the
8 Court was to say, well, you know, even though that's
9 technically correct, you know, it seems like the five levels
10 is, you know, sort of getting at the same concern and,
11 therefore, I don't need to, de facto, sort of count both when
12 sentencing. We'd be looking at 47 minus 5, then, to get you
13 to 360 to life. Fair to say? Like, that's what it would be
14 rather than 43 minus 5. See what I'm saying?

15 MR. SUEDEKUM: Certainly, Your Honor. I think
16 adding them together, the Court calculates a total offense
17 level, and then if the offense level falls above 43, then the
18 Court brings the total offense level back to a 43 for the
19 purposes of the guideline calculation.

20 I would again, Your Honor, note that the
21 difference between the production counts which involve the
22 production of child pornography versus the separate counts
23 and the separate charges for the sexual exploitation, the
24 sexual abuse, engaging in sexual conduct repeatedly with the
25 victim in this case, Your Honor, I -- I believe I have the

1 PSR here -- but the guidelines are really driven by the child
2 production counts.

3 And so I do believe it is fair to say that there
4 is still separate conduct that is being reached by the two
5 different guideline provisions that are operating there.

6 THE COURT: Let me ask you along the lines of
7 thinking about this case more generally. I mean -- and there
8 are many ways to, I think, look at the kind of egregious
9 misconduct we saw here, right? Lots of different ways to
10 look at it. One way is to say if you're looking at the two
11 primary thrusts of what went wrong, one is the production of
12 child pornography which is, as you say, a very serious crime.
13 And another is the sexual contact, the actual sexual contact.
14 The -- and, you know, one of the -- at least one of the
15 counts talks about -- I think two of them talk about the
16 predicate crime of statutory rape and, in fact, aggravated
17 statutory rape under Tennessee law.

18 And one way of thinking about it, two big buckets
19 that are the primary wrongs in this case, those two things.
20 The predicate offense of aggravated statutory rape, one of
21 the things the Court has in mind is that if I understand
22 correctly, it's a Class D felony in Tennessee, so the -- the
23 maximum possible sentence for statutory rape, no matter what
24 your criminal history, let alone in the lower category that
25 Mr. Frei is in, but it is 12 years.

1 So one of the things the Court has in mind,
2 understanding it's not bound by state -- you know, state
3 policy decisions about the maximum sentence, but in a very
4 serious sentencing question like this, whether someone is
5 going to get life in prison or something closer to what the
6 Defense is asking about, you know, if we see -- if we start
7 to look at the -- the wrongs involved, and maybe look at
8 them, even if we say, you know what? He deserves the maximum
9 penalty, in essence, for statutory rape and, in essence, a
10 severe sentence for child pornography. If you -- even if you
11 put those two things together, you're not talking about, you
12 know, a sentence of life in prison or 35 years or something;
13 it's going to be something a little bit less.

14 And so I guess my question for you is, if I look
15 at the substance of this as involving two very serious
16 wrongs, each of which is worthy of a harsh punishment, how
17 could I be sure that going above, let's say, 30 years is not
18 overkill?

19 MR. SUEDEKUM: Your Honor, I think one of the ways
20 that you can begin by doing that is beginning by going back
21 to the guidelines. The guidelines are designed to take
22 account of a variety of different conduct in order to help
23 assure that the individual is not being treated solely by
24 virtue of the offense, but based on their actual offense
25 conduct and what they are accused, and in this case

1 convicted, of having done.

2 One thing that I would take issue with, Your
3 Honor, is that with regard to child pornography, I believe
4 the starting point would be 15 years, and so not simply that
5 15 plus 12 would be to -- in the range of 27, but I think
6 that's really just a starting point.

7 THE COURT: Yeah, right. I think that's fair to
8 say. So you would have 12 -- so you'd be up to 27. So you
9 could have, you know, a pretty severe sentence on both of
10 those, though, and you're still maybe not looking at life.

11 MR. SUEDEKUM: That's fair, Your Honor.

12 A couple of additional facts that I would point
13 out to the Court are the -- one, this is not merely a case --
14 and I don't mean to underestimate the seriousness of the
15 production of child pornography. This is not merely a case
16 where the Defendant created child pornography. This is not
17 merely a case where he engaged in aggravated statutory rape
18 of a minor. The Defendant sought out a 15-year-old girl on a
19 Facebook chat room for teenagers. And the Court saw the text
20 messages. They were -- the Facebook messages. They were
21 entered at trial.

22 There was a grooming process. There was an
23 enticement, a solicitation period where the Defendant is
24 really the one who led the victim and was able to entice the
25 victim to engage in this conduct. And so I understand the

1 Court's point. There is the initial online solicitation of a
2 minor, and it was certainly knowing, is what the evidence
3 showed at trial. There was no dispute that the Defendant not
4 only knew that the victim was 15 years old, but that appeared
5 to be what he was attracted to about her was the fact that
6 she looked so young.

7 In addition to the solicitation, there was the
8 interstate travel to engage in a prohibited sexual act, there
9 was the actual illegal sexual act that he engaged in with the
10 victim, and there was the creation of child pornography.

11 In addition to all of those things, Your Honor, as
12 we discussed a moment ago, the Defendant did this multiple
13 times over the period of a month; at least three trips for
14 which he was convicted of traveling from North Carolina to
15 engage in illegal sexual activity and producing visual
16 depictions of it.

17 And so while perhaps it might be easier if it were
18 one count of production of child pornography and it were one
19 count of engaging in an illegal sexual act, it might be
20 easier to put together those two charges and say what would
21 seem like a fair sentence here. I do think that the repeated
22 acts the Defendant engaged in over a prolonged period, even
23 just with respect to Miss Bushong, we are talking about
24 roughly a month. Not something that just happened one night
25 or out of the blue or somehow, you know, a mistake or a lapse

1 in judgment. Over a month just with Miss Bushong.

2 All of those factors, Your Honor, I think show why
3 the guidelines place the Defendant at a guideline range of
4 life imprisonment, because of the repeated nature of his
5 conduct. And so that is why we've requested the sentence of
6 life imprisonment, and we do think it is appropriate in this
7 case, Your Honor.

8 THE COURT: All right. A couple of more
9 questions, and I appreciate the dialogue. One is the
10 Government's argument about unwarranted sentencing disparity.
11 And I see what it's saying. But fair to say the Government's
12 argument there doesn't actually address the disparity that
13 3553(a) is expressly addressed to, which is disparities
14 amongst defendants with similar records convicted of similar
15 conduct.

16 It's -- you're talking about the disparity
17 between, as I see it, the offense level he received under the
18 guidelines and the offense level he could have received.
19 That's really the -- right? Because I think the argument
20 there is he -- look, he ended up with an offense level of 43;
21 could have had an offense level of 47. That seems to be what
22 this argument is. And that argument has various, I think,
23 applications. I understand that. But it's not really
24 addressed to whether a sentence of life imprisonment would be
25 disparate compared to other offenders convicted of similar

1 conduct and similar records.

2 MR. SUEDEKUM: No, Your Honor, I wasn't purporting
3 to say sort of what the national average is regarding these
4 types of offenses. My point was more that in sticking closer
5 to or at the guidelines, by default would be -- sticking
6 within the guidelines meaning I did address the *Bruffy* case
7 just because I do think it is instructive to see a Defendant
8 who is not alleged to have engaged in sexual conduct with the
9 victim. The Defendant who took images, all the victims were
10 asleep, who were not personally impacted or traumatized by it
11 because they weren't aware the photos were taken; even
12 setting aside those differences which I think make the
13 Defendant's conduct in this case much more severe, that type
14 of Defendant, charged with a total of three counts, received
15 a 23-year sentence.

16 And I do think -- I understand, Your Honor, that
17 from 23 years to life, that it's still a wide range, but I do
18 think it is instructive to see that even in that type of
19 case, a Defendant still received a 23-year sentence and shows
20 the need for an even more lengthy sentence for the Defendant
21 in this case.

22 THE COURT: All right. I appreciate that.

23 One final issue is this: So if the Government is
24 asking for a life sentence, as it notes, that's the guideline
25 sentence. And this Court does not strive to pronounce a

1 reasonable sentence; it strives and it needs to pronounce a
2 sentence sufficient but not greater than necessary to achieve
3 the recognized goals of sentencing.

4 But the fact remains that as a guideline sentence,
5 a sentence of life would be presumed reasonable on appeal
6 which is, again, not what the Court looks at. So -- not what
7 the District Court looks at. And so I'm not saying that the
8 Government is doing anything unreasonable in asking for the
9 life sentence. It's a guideline sentence.

10 But one question that I do have is this -- well,
11 one observation and one question. Life, in addition to being
12 the guideline sentence here, is also, of course, the
13 statutory max and really the constitutional max, right,
14 because there is no death penalty for crimes other than
15 murder essentially, right?

16 MR. SUEDEKUM: Correct.

17 THE COURT: So should there be a concern that this
18 is the very most serious sentence that could be imposed, what
19 the Government's asking for, and we are dealing with the
20 Defendant who, you know, for example, he's in the lowest
21 criminal history category. He is at a -- and I don't think
22 there's any question about that. I don't think there's any
23 question that his risk of recidivism upon release from a
24 lengthy term of imprisonment would be lower than some other
25 offenders even though maybe age doesn't diminish a sex

1 offender from these kinds of crimes of prey. Age may not
2 diminish the risk for sexual offenders the same way it does
3 some other kinds of crime.

4 We are dealing -- if you look at the facts, could
5 the facts be worse? It's terrible facts, right? It's
6 terrible. Could they be worse? Well, you can imagine them
7 being worse. The person could have been younger. This is a
8 very -- this is a minor victim, extremely naive, I think it's
9 fair to say anyone would say, for her age. And I'm not
10 minimizing that at all, but to say you could have -- you
11 could have an even more vulnerable younger victim.

12 And so I guess what I'm saying is, pointing out
13 circumstances, particularly regarding criminal history and
14 age of the victim where we could be dealing worse with -- we
15 could be dealing with worse facts but we can't have a worse
16 sentence.

17 And so, you know, how does the Court know that the
18 very highest sentence possibly imaginable under our system
19 should be imposed here when, you know, we don't necessarily
20 have the worst offender? And I don't know -- and I think
21 that's a question the Court has, and I -- if there's anything
22 else you wish to say -- and obviously you've set forth the
23 Government's basis for its position under the law, under the
24 guidelines, under a very egregious set of facts, and if there
25 is anything else you wish to say on that, I'm happy to hear

1 it.

2 MR. SUEDEKUM: Your Honor, I suppose it's almost
3 always possible to construct or come up with a worse set of
4 facts. And I don't believe this is what the Court was
5 saying, but I don't know that a defense or a response of "It
6 could always be worse" is necessarily really anything in
7 favor of a more lenient sentence.

8 What I would say in response to the Court's
9 concern is that I would note that I do think there is a
10 serious need for not only general deterrence, that -- to the
11 extent that, you know, individuals who are out there in the
12 public might not look at a, you know, United States Code book
13 and see the penalties that are out there and what they might
14 be facing for engaging in certain conduct.

15 They might read a newspaper. They might read a
16 press release. And seeing the seriousness and a significant
17 sentence for this type of conduct, which is -- the Court is
18 fully authorized to do by issuing a life sentence, would send
19 a message to the community about people who had engaged in
20 this type of conduct, whether it be with a 15-year-old,
21 whether it be with a 5-year-old.

22 I would say, Your Honor, that the fact that an
23 individual, the victim could have been younger, it's
24 certainly a factor. I would note -- and the Court heard the
25 victim's testimony in this case. She was especially -- even

1 though she was 15 years old at the time, there were a number
2 of factors, there were a number of things going on in her
3 life that made her especially vulnerable.

4 THE COURT: Not least of which -- and this kind of
5 thing isn't lost on the Court. You know, I do think there
6 was this extreme naivety, and I don't mean that in a
7 pejorative way at all. And unfortunately, some of our
8 youngsters approaching 16 are very active sexually, and
9 this -- and that's not a defense to anyone of Mr. Frei's age
10 acting sexually towards them. It is to say that someone with
11 some -- with sexual experience maybe has a way to at least
12 attempt to cope with these advances in a way that this victim
13 was unable to do so because she was extremely naive, even for
14 her age.

15 Not, you know, I mean, because she was -- again,
16 there are lots of girls her age, unfortunately, who are
17 sexually active. She was not one of them, and that's not
18 lost upon the Court. She had said she had told him that she
19 had kissed a boy once, and it sounds like it was some peck on
20 the lips or something; and this vulnerability, even though
21 she wasn't younger, is not lost on the Court, and so I get
22 what you're saying there.

23 MR. SUEDEKUM: And then finally, Your Honor, I'll
24 wrap up, but I do want to note that in addition to general
25 deterrence, I do think there is a serious need for specific

1 deterrence in this case. And we laid out part of that and
2 some of the background in our sentencing memorandum as it
3 pertains to this Defendant. This was not a onetime thing.
4 The Defendant had hundreds of images of underage children,
5 girls, boys, on his phone.

6 He admitted, in the August 3rd interview, he had
7 spoken to other underage people, that he attempted to meet
8 with them. This was not a one-off occurrence both as it
9 related to Miss Bushong but also more generally to the
10 Defendant's mind-set. And in trying to factor in and weigh
11 the Defendant's history and characteristics, I do think it is
12 important to take stock of that, because that really doesn't
13 come through in the guideline calculations but, I think, is a
14 specific factor that relates to the Defendant and the
15 possibility that this Defendant, regardless of what the
16 statistics may say, that this Defendant might be likely to
17 re-offend.

18 Even during his interview with Detective Adkins
19 when that search warrant was executed at his home -- and we
20 discussed this briefly and -- in the *Miranda*, that the
21 Defendant didn't seem particularly apologetic about the fact
22 that he was reaching out to and discussing sex, sexual
23 activities, with a minor. It was almost simply the Defendant
24 had a disagreement about the laws that we have in the United
25 States.

1 Whatever that disagreement, it certainly doesn't
2 entitle someone to disobey them, and so I think there is a
3 need for specific deterrence in this case as it relates to
4 the Defendant to protect the public, to protect people like
5 Miss Bushong, whether it is because they are particularly
6 vulnerable, whether it's because they are naive, whatever the
7 reason may be, that there is a need to protect the public
8 from the Defendant.

9 THE COURT: All right. Very well. Thank you very
10 much, Mr. Suedekum.

11 So Mr. Buckholts, if you wish to make your
12 remarks.

13 MR. BUCKHOLTS: Yes, Your Honor. Thank you.

14 Your Honor, I first want to address for sentencing
15 for the 3553 purposes really the individualized factors under
16 3553(a) for Mr. Frei, sort of tie these together hopefully
17 for the Court in trying to come up with a sentence that's
18 sufficient but not greater than necessary to meet all of the
19 sentencing goals.

20 Now, in the brief, as Your Honor's seen, the -- a
21 big factor that Mr. Frei focused on was not only his age upon
22 release which are related to some of the factors in all --
23 really, to some extent, all of the sentencing factors, but
24 more along the lines of the factor with disparity in
25 sentencing and the likelihood of an offender committing

1 crimes again upon release.

2 So I went back through the PSR and his history,
3 and as the Court is aware, he didn't have an easy childhood.
4 He was in a lot of foster homes, bounced around from
5 different homes, didn't have any stability. Notwithstanding
6 that, he still had some positive aspects in his history,
7 especially his work history and military history. He was
8 able to still achieve things in life notwithstanding those
9 challenges, and I cited some statistics. A lot of defendants
10 that come before this Court, as we see on a regular basis, do
11 fail out, you know, that are -- grow up with very difficult
12 challenges as kids.

13 THE COURT: Let me ask you this about military
14 history. I saw the Probation Office could not confirm this.
15 And, of course, I don't know whether he served or not. But
16 what should I think about that, the fact that there,
17 according to Military, there was no record of his service?

18 MR. BUCKHOLTS: Well, and we've spoken with
19 Mr. Frei about that. And a lot of his records are, you know,
20 difficult to get from -- Probation wasn't able, you know, we
21 weren't either. His phone was confiscated and things like
22 that. I would say this, though, because I thought about that
23 before. There were some things that as far as job history,
24 of course, we, a lot of times, get back, you know, unable to
25 confirm certain jobs. But there were some of the jobs that

1 were confirmed. And there's also a sort of employment gap
2 there around the time that he would have been 18 years old to
3 about 22.

4 And so, you know, I think the Court -- understand
5 the Court might look at that as how much weight to give that.
6 But I would just ask the Court to consider that, to give it
7 appropriate weight, notwithstanding the lack of verification,
8 and not necessarily assume that, well, he must be lying he's
9 a military. You know, I'm not experienced with how that
10 works. I know we send off for records sometimes and have
11 trouble getting things back to verify.

12 THE COURT: Yeah. Yeah, it's hard to know why
13 there was no record. Yeah.

14 MR. BUCKHOLTS: The -- as far as -- another thing
15 that I highlighted in characteristic about Mr. Frei was the
16 lack of substance abuse, which I also would tie into --
17 should tie in, presumably tie into his ability to receive
18 treatment and be successful on supervision and treatment upon
19 some release at some date in the future. As the Court is
20 aware, I don't think that I would need to -- I'm sure there's
21 plenty of anecdotal evidence. I didn't cite any statistics
22 specifically on the substance abuse, but I know anecdotally,
23 many Defendants, when they're coming up with violations,
24 almost all of them -- I don't know; maybe that's an
25 overstatement -- but many of them are related to substance

1 abuse issues.

2 So that -- that factor in his background is
3 also -- should work in his favor, and I would ask the Court
4 to consider it.

5 As far as his age, if he were to receive -- the
6 Court were to give him a 15-year sentence which is the
7 mandatory minimum statutory sentence that the Defense is
8 requesting, he's not going to be a young man upon release.
9 He will be 51 years old this February 10th, I believe. And a
10 lot of things can happen in a decade in somebody's life or a
11 decade and a half.

12 A 15-year sentence would -- considering
13 individualized, if the Court is looking at retribution as a
14 factor or even -- I don't think that that is really there for
15 deterrence rehabilitation.

16 Or if the Court is looking at focusing in on what
17 about the goal of retribution or the goal of incapacitation,
18 that could be a 15-year sentence, could be a life sentence.
19 I mean, we don't -- especially in prisons when people's
20 lives, the standard of living and the mortality rates, I
21 believe there are studies that they do go down in -- when
22 people are imprisoned.

23 So for those purposes, retribution and
24 incapacitation, a 15-year sentence would still be a
25 significant sentence to meet those -- to meet those goals.

9 And so the BOP is keeping up with, you know, some
10 data on those issues to try to educate the public and the
11 Courts, and the U.S. Sentencing Commission is doing a -- has
12 done multiple studies.

I also noted in the brief that the U.S. Sentencing Commission has made certain recommendations to Congress. And to my knowledge and awareness, Congress hasn't seemed to act on these. And these statutes, as the Court pointed out, the driving guideline offense is the production. I think the Government acknowledged that in its statements.

19 Base level 32 carries a mandatory minimum of 15
20 years but a cap at 30 years. The Count 7 enticement cap has
21 a mandatory minimum of 10 years, but a statutory maximum of
22 life. And I believe --

THE COURT: As far as the Count 5?

24 MR. BUCKHOLTS: I'm sorry. Was that -- could have
25 been Count 5. I may have misstated. It was the enticement

1 count. If I could have one moment so I don't make a mistake
2 which count that was.

3 Yes, Your Honor. I'm sorry. It's Count 5, 18
4 United States Code, Section 2422(b), which the base level on
5 that one, if I'm not mistaken, starts out lower. It starts
6 out 28 rather than 32. So you've got really the highest
7 driving guideline in production counts. And so it -- it
8 doesn't make total logical sense that Congress would say this
9 offense carries a maximum of 30 years. But the guidelines
10 started out at a base level 32; and another offense, it
11 carries a maximum of life, and so --

12 THE COURT: It's also a little strange -- and I
13 could see ways to reconcile it -- but that the offense that
14 has a much higher statutory maximum has a lower mandatory
15 minimum.

16 Now, there are ways to reconcile that. So in
17 other words, well, Congress recognized there should be a
18 broader range of punishment -- 10 to life rather than 15 to
19 30 -- because even though the least culpable conduct for the
20 charge in Count 5 is less serious than the least culpable
21 conduct for production of child pornography, the worst is
22 much greater.

23 So I do see that the notion that Congress says
24 there should be a wider range of punishment on Count 5 can
25 make some sense, but I do see the dissidence you're talking

1 about, which is like, well, if Count 5 is so bad as to
2 authorize life, why is its base offense level what it is, and
3 why is the mandatory minimum lower than the offense that has
4 a statutory maximum of 30?

5 MR. BUCKHOLTS: And in trying to go through the
6 guidelines and research it, it's really hard to put all this
7 together as to what the U.S. Sentencing Commission and
8 Congress -- some of it you can see, which sort of brings me
9 to the variance request. I'm asking -- Mr. Frei's asking for
10 a variance.

11 I want to make clear from the -- if it was in the
12 position papers, asking for a general variance just on 3553
13 factors considering all of the individual characteristics of
14 Mr. Frei. But I also wanted to point out to the Court some
15 of these very specific guideline enhancements, the five-level
16 and the four-level for the -- for the number of victim -- the
17 multiple occasions and the enhancement for the grouping.

18 It does appear to me, as Your Honor has pointed
19 out, that some of this looks like it's counting the same
20 conduct multiple times, and I understand that the guidelines
21 sometimes do that and there's sometimes reasons for that.

22 But when you're looking at really a nine-level
23 enhancement, and you go from anything less than life to a
24 life sentence, it is an extremely big jump in the guideline
25 enhancement.

1 And so as far as the case cited, the *Bruffy*
2 case -- and it's always difficult with any case to try to get
3 on all fours on the facts. One of the things that I was
4 looking for in that case and I wasn't able to find is, you
5 know, I would have been interested to know, is how old was
6 the Defendant in that case? Would a judge look at that,
7 okay, I've got a Defendant that is 50 or 60 -- we'll say even
8 60 years old, and I have a Defendant that's 20 years old. Am
9 I going to sentence the Defendant that's 20 years old to 25
10 or 30 years to meet some of these goals versus a Defendant
11 that by -- you know, with that sentence, would effectively be
12 a life sentence? And so that's one of the factors.

13 And then, of course, some of the similarities and
14 characteristics with work history and him being the Criminal
15 History Category I versus other people that are in higher
16 criminal history categories that this Court has to sentence
17 every day.

18 THE COURT: Well, and the other thing is, let's
19 say you had a sentence of -- just throwing a number out, not
20 telegraphing where I'm going with anything. But if you had a
21 sentence -- let's say you imposed, as the Court, a sentence
22 of 40 years. Well, maybe a better example would be -- let's
23 say 35, just the way ages work. A sentence of 35 years is
24 much, much closer to a life sentence and, therefore, much
25 less of a variance than it is for a 20-year-old, correct?

1 You see what I'm saying?

2 So if I were to give a 20-year-old with a
3 guideline sentence of life -- sentence of 35 years, that
4 could be a much bigger variance than for someone who is 47.

5 Why? Well, it's based on life expectancy.

6 MR. BUCKHOLTS: Correct. Yes, Your Honor.

7 So it kind of cuts both ways because on the flip
8 side, you have a Defendant that's reaching an age you could
9 give a 15- or 20-year sentence, it may be a life sentence.
10 So it's sort of -- it does sort of cut both ways on that.

11 I wanted to talk about the specific deterrence
12 issue. The Government had -- argues that specific deterrence
13 as to Mr. Frei, that a life sentence would meet that goal of
14 specific deterrence. It's difficult to imagine how a life
15 sentence, it really looks like it sort of conflates specific
16 deterrence with incapacitation. I mean, I think the better
17 argument, if one is asking for a life sentence, is that it's
18 incapacitation or retribution. Those are really the only two
19 goals that I can see that the Government could even argue
20 about regarding rehabilitation is not going to be a --
21 enhanced by a life sentence.

22 And I would argue deterrence is not really --
23 especially specific deterrence, because if one were
24 20-something years old and the Court gave a lengthy sentence,
25 arguably a specific deterrent would be, okay, I don't ever

1 want to be sentenced to that -- I will never commit that
2 crime again because of the lengthy sentence, so you could
3 see.

4 But with a life sentence for somebody, that's just
5 simply incapacitation. It's just, you're not going to be
6 able to commit this crime as to -- we are going to deter you
7 from being, you know -- it's more along the ability to commit
8 such a crime against a minor child. And so it's more on the
9 incapacitation.

10 But with that ties into the factors on
11 incapacitation with the likelihood of re-offending, which,
12 that's why in the briefing, the age is such a huge factor and
13 the other individualized facts and -- of Mr. Frei's life to
14 determine whether -- if the Court was to give a -- grant a
15 variance, whether that would still meet the goal of
16 incapacitation.

17 It's his contention that it would, that a 15-year
18 sentence is going to incapacitate him for a number of years,
19 and also the fact that he's going to be on supervision at
20 least five years and is not arguing for anything -- you know,
21 lifetime supervision could be -- would be reasonable.

22 THE COURT: Let me ask you this, and maybe I
23 should ask Mr. Suedekum. But, you know, one of the reasons
24 we have sex offender notification registries -- I presume
25 they still exist after all these years -- because they are of

1 some value in protecting the public.

2 MR. BUCKHOLTS: Right.

3 THE COURT: Would you agree with that?

4 MR. BUCKHOLTS: Yes, Your Honor. They're still in
5 existence and yes, they are to protect the public.

6 THE COURT: Does that decrease the need to protect
7 by incapacitation via incarceration after a certain amount of
8 time?

9 MR. BUCKHOLTS: The relation to incapacitation of
10 a mandatory reporting requirement, the sex offender registry,
11 those things are in some way going to incapacitate one;
12 definitely going to make it more difficult for somebody to be
13 able to with all of the restrictions and -- of supervision.
14 And along with that, the goal of incapacitation can be met
15 without a life sentence. It's just that -- it's just
16 that . . .

17 Also, of course, the Court has to be concerned
18 about the disparity in sentences and those situations. Of
19 course, the Court looks at those, looks at whether or not the
20 likelihood that the person would -- is likely to re-offend
21 upon release is obviously a concern for every judge. Is this
22 person that I'm sentencing, are we ever going to see this
23 person again, you know, later on down the road?

24 With a 15-year mandatory minimum sentence and a
25 supervision which would be extremely stringent, some of those

1 concerns should be -- should -- wouldn't say minimize.
2 Trying to find the right term. That should address some of
3 the Court's concerns with being concerned with somebody
4 re-offending.

5 Of course, we've addressed -- and so Mr. Frei is
6 requesting that he be provided with a -- that the Court
7 recommend a Bureau of Prisons sentence that allows him to
8 participate in the residential sex offender treatment
9 program, the most stringent one that -- that there is or the
10 best, I guess I should say, sex offender treatment program.
11 And he would ask that the Court recommend that he be placed
12 in a facility that has that specific program, wherever there
13 may be space available, and that he -- that his sentences run
14 concurrent with each other so that it would be effectively a
15 15-year sentence, and that that type of -- that such a
16 sentence would be sufficient but not greater to meet all of
17 the goals of sentencing and also take into account his
18 individualized characteristics and history.

19 One other thing I would want to address, and this
20 will be the last thing in closing. Mr. Frei, of course,
21 doesn't receive any reduction. He did not -- he went to
22 trial; he did not plead guilty. As the Court is aware,
23 though, he didn't contest the facts at trial. He did contest
24 the application of the facts to the statutory elements on the
25 production counts, but he hasn't -- he didn't present any

1 defense that, it wasn't me, I didn't do that, none of those
2 things. So the Court could look at that as a -- in light of
3 a variance as well as part of the overall 3553 factors.

4 THE COURT: All right. Very well. All right.
5 Thank you. I appreciate that, Mr. Buckholts.

6 If Mr. Frei wishes to allocute, he may do so now.

7 THE DEFENDANT: Yes, Your Honor.

8 First, I'd like to thank Your Honor for your time,
9 and I apologize that we get to meet this way. And I'm not a
10 very eloquent speaker, so just take this as I come. It's
11 pretty much impromptu.

12 THE COURT: No, it's your place to say whatever
13 you want to say however you want to say it.

14 THE DEFENDANT: As for a question you asked
15 earlier about my military record, I'd like to state that I
16 enlisted at 17, a minor according to these Courts, to serve
17 my country. I meant no disrespect by my actions today for my
18 previous record. As for the reason that you cannot find my
19 record, the probation department has the wrong Social
20 Security number. Can't find me if I don't exist on paper.
21 That -- you know, I have an employer that can verify that.
22 They have a copy of my DD 214 and a copy of my Honorable
23 Discharge certificate.

24 You know, when sentenced, I know I'm guilty. I'll
25 be punished according to what you believe. I plan to take

1 full effect of any and all programs that I can attend -- that
2 are feasible, I should say.

3 I never intended to be here. This is all a
4 misunderstanding, a bad judgment, you know. I was in a
5 relationship with an individual, a consenting relationship.
6 On my side, you know, my belief, it was a consenting
7 relationship. Bad judgment, yes. Will not deny that.
8 Things should have been done different, yes. Hindsight,
9 20/20. I just hope the Court takes that into consideration,
10 you know.

11 As me as a person, I'm one of those ones that if
12 you break down on the side of the road, I'm going to be the
13 guy that pulls up behind you and asks you if you need help.
14 If you've got a flat tire, I'm going to change it. I'm the
15 one that, you know, I -- charity is -- you gotta pay it
16 forward, you know. Whatever I do, whatever I've done, I try
17 to help whenever I can and pay it forward because someday
18 it's going to come back to me. I hope you see that.

19 You know, I've done some things. I'm made out to
20 be a monster, but I'm not that person. People can manipulate
21 paperwork, redact, fail to read everything, and come to their
22 own conclusions. It's done all the time.

23 But I'm not that person. And if you do not give
24 me life -- I hope that you don't because hope is all a person
25 has -- I guarantee you'll never see me in this court again.

1 It's been an exhausting experience for everybody. It starts
2 with my lawyers.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you, Mr. Frei.

5 All right. The Court has familiarized itself with
6 the entire record. As it, of course, indicated and as
7 everyone knows, it sat through the trial; it's listened with
8 interest to what counsel said here today; it listened with
9 interest to what Mr. Frei had said here today as well; and it
10 is prepared to comment on the 3553(a) factors and pronounce
11 sentence.

12 We start with the nature and circumstances of the
13 offense, and the nature and circumstances of the offense are
14 pretty terrible. They are. And I was with Mr. Frei on some
15 of his comments. I felt like others of his comments, though,
16 were unfortunate because I don't think we're dealing with a
17 misunderstanding. I -- I'm not a psychologist, but if I was,
18 perhaps I would -- well, let me not talk hypothetically.

19 Not being a psychologist, you know, I wonder if
20 Mr. Frei, what he means or what he's rationalized is that
21 it's a misunderstanding that he didn't intend to hurt anyone
22 and that kind of thing. I wonder if that's what he meant.

23 I do think it's important to understand, though,
24 that as regards the criminality here, there was not a
25 misunderstanding because the age of the victim was known to

1 Mr. Frei. I think to Mr. Frei, what he was doing to the
2 victim -- and I'm going to speak in terms of a euphemism --
3 taking from her something that she couldn't get back, this
4 would be entirely clear.

5 Now, I understand, from the texts and various
6 other things, that Mr. Frei's circumstances are such that in
7 interacting with the victim in this way, he didn't intend to
8 mean harm in the sense of, I don't know, taking a rock and
9 striking her in the head and leaving her out in the woods. I
10 understand that. But the intention to interact with her in a
11 way that, of course, would be harmful to someone that young
12 and that naive is entirely clear. And in that sense,
13 Mr. Frei, I think, deceives himself if he speaks in terms of
14 it being a misunderstanding.

15 The part of the record we're dealing with here is
16 a variety of circumstances that would indicate looking for
17 young people to use for sexual purposes. And not being
18 trained in the psychological arts, I can't say that Mr. Frei
19 didn't rationalize it as if he was doing something nice for
20 them or good for them or so forth.

21 But what was known to him was that, of course,
22 these were youngsters and persons that he would have known
23 are not in a position to consent. And from the texts, he
24 would have known that this person, although not our youngest
25 victim, was not someone who could cope with this sort of

1 advance, could not cope with the sexuality, could not very
2 well cope with going from no sexual experience whatsoever to
3 extraordinary sexual experience like that. And this is
4 very -- it's very damaging to a young person and it is taking
5 severe advantage of them and it's extremely serious conduct.

6 And I think the predatory aspects of this are, I
7 think, looking for victims online, the clear pattern of
8 scheming to avoid parents and detection. Other aspects
9 were -- for example, you know, if you look at the texts, if
10 we talk about the graphic nature of the texts, I think you
11 don't have to be a prude to see that talking this way to an
12 inexperienced 15-year-old is just terrible.

13 And, you know, this Court does not sentence
14 people, you know, based on a version of -- well, it doesn't
15 sentence people based on their sexual desires, it bases
16 sentence on conduct. And what we see is a pattern of taking
17 advantage of the young person in terms of actual conduct that
18 would be extremely damaging to a young person. And this is a
19 situation where I can imagine someone like Mr. Frei is not
20 thinking of this as a coercive situation.

21 And look, I understand the difference between the
22 situation we had and a situation where if you added in on top
23 of it, she was, in all respects, literally trying to flee
24 from him, trying to get away from the very beginning and all
25 that. And I understand that distinction. But under other

1 laws, this is a form of coercion of a young person whose
2 consent is no good. And so what we have is coercive sex of a
3 young person that was not prepared for it, and it's extremely
4 serious.

5 And there are other aspects about it that, again,
6 you don't have to be a prude but, rather -- you don't have to
7 be a prude to be just alarmed by some of the features of the
8 offense such as, for example, the fact that there was sexual
9 activity taking place in a park in a public place with this
10 youngster.

11 So these crimes are very serious.

12 I had alluded in -- well, let me add something
13 else about the seriousness of the offense. Of course, we do
14 have the whole aspect about filming this. And, you know, the
15 effect of that is, every time that this thing is -- video is
16 replayed or an image is showed or the mere fact that it's
17 lying around somewhere to be viewed is further victimization,
18 and that's part of the offense conduct.

19 I had -- you know, I had asked some questions of
20 Mr. Suedekum which, I think, are relevant about a life
21 sentence, and the Court is very concerned about this point.
22 The Court -- and Mr. Suedekum had indicated he didn't take
23 the Court to mean this, but the Court's point is not that,
24 well, you only get a life sentence -- which, again, is the
25 constitutional maximum for an offense like this -- you only

1 get it if your offense is such that it could not possibly
2 have been worse, or you only get a life sentence if your
3 criminal history could not possibly have been worse. And I
4 do understand that.

5 I do, though, think that there are ways in which,
6 believe it or not, the offense could be worse than the
7 horrifying way it was that should -- and the Court needs to
8 take account, the victim in looking at the Defense side of
9 this. Things like, well, the victim could have been younger,
10 the conduct could have been even more coerced than it most
11 certainly was.

12 He didn't physically beat her, but he did assault
13 her. He sexually assaulted her. I grant you he didn't do
14 something like beat her. Maybe in his own mind, he
15 rationalized it as just being a Casanova. Of course, it's
16 much more serious than that.

17 So far as we know, there was no financial motive,
18 and I suppose the crime could have been worse in that regard.

19 Other things, he could have, for example, got up
20 and perjured himself at trial. There are various ways in
21 which the offense or the follow-up to the offense could have
22 been worse. And I think that has to be relevant to the
23 consideration whether the constitutionally maximum sentence
24 is imposed.

25 But none of that is to say that we are dealing

1 with something other than extremely serious conduct, whether
2 we're talking about the contact elements of the offense, the
3 physical contact, or the filming part. Of course, they're
4 interrelated, but there are a couple of different kinds of
5 harm here.

6 The Court does turn to the history and
7 characteristics of the Defendant. Now, I think there are
8 several relevant things here. First, it is certainly a
9 substantial point in the Defendant's favor that he's Criminal
10 History Category I because, you know, he could be the worst
11 offender imaginable with the worst criminal history, and the
12 Government would be asking for the same thing. And that is a
13 concern for the Court where he could come in with a much
14 worse criminal history record and not be subject to any
15 higher offense than what the Government is asking for, and I
16 think that's relevant.

17 Now, although he's Criminal History Category I,
18 there are a couple of things that concern his criminal
19 history. One of them appears to be not the most serious
20 offense you see regarding sort of sexual crimes related to
21 young people, but it is related to that. Now fortunately,
22 there was only one and it was 16 years before the instant
23 offense, but it is there. And then in prior offenses, we did
24 see the violation that -- violating conduct that I had
25 alluded to. And that is of some concern, but that was from

1 the 1986 time frame.

2 The Court wants to comment on the history and
3 characteristics of Mr. Frei. And, you know, I think it's
4 fair to say for Mr. Frei that his upbringing, which has not
5 been disputed, set him up for dysfunctional behavior. And
6 the Court -- that's not lost on the Court. You know, if you
7 read about his background, the Court believes, and I don't
8 think it's very controversial, that this sort of background
9 is the kind of thing that naturally lends itself to
10 individuals having unhealthy, inappropriate, and criminal
11 desires of all kinds including, in some cases, sexual ones.
12 But there's also the fact that, you know, no one's here to
13 sentence Mr. Frei for whatever desires; it's the conduct.

14 So, you know, persons with very difficult
15 upbringings, they probably are -- they are entitled, in the
16 Court's view, generally to more leniency than people with
17 less troubled upbringings, and the Court understands that.
18 But on the other hand, there's nothing about a troubled
19 upbringing that makes you carry out the conduct here that
20 harms a victim repeatedly over time. And so the Court sees
21 both sides of that.

22 You know, the Court tends to understand the
23 difficulties of upbringing and how it sets people up for
24 major failures in life as the sad cycle of the human
25 condition continues. But people need to refrain from

1 criminal acts, whatever they're feeling inside, and we hope
2 they aren't feeling these sorts of desires. But whatever is
3 going on in here, going out into the world and preying on
4 people is not okay. But the Defense argument that this sort
5 of upbringing can be the kind of thing that's cause for
6 leniency, the Court is willing to accept.

7 There's some work history and there's discussion
8 about military history which, again, the Court really can't
9 make any conclusion about except to say it's not doubting
10 that there was military service.

11 There was some work history. There was some work
12 history reported by Mr. Frei that, according to the PSR, the
13 employer is insisting -- or, I should say the alleged
14 employer is insisting it didn't happen. But there is
15 certainly some work history there, and the Court acknowledges
16 that.

17 And the Court is also inclined to agree with
18 Mr. Buckholts that the lack of these substance abuse issues,
19 actually that does speak positively to a person's character.
20 A lot of times in this courtroom, the fact that someone has a
21 substance abuse issue is treated as a good thing for a
22 Defendant, meaning grounds for leniency, because it helps
23 explain criminal conduct.

24 Well, setting aside that circumstance, here we do
25 have a history that does not involve substance abuse by all

1 accounts, and that's a point in Mr. Frei's behavior. Perhaps
2 maybe it reduces the risk of future noncompliance with the
3 law in this case, although one of the things about the risk
4 of recidivism for sex offenders is, their incentives and
5 their acting out on their perceived incentives to reoffend
6 are different than other kinds of offenses, and the Court
7 needs to be concerned about that. I would call it -- it's a
8 more impulsive crime, although I'm not really sure
9 "impulsive" is really the way to put it because it may sound
10 like it excuses certain actions.

11 The Court wants to talk about some of the policy
12 arguments that were sort of advanced in terms of the
13 congressional goals of sentencing. One of the things that at
14 least other Circuits have said is that a District Court must
15 acknowledge the congressional statement of intent as
16 manifested by mandatory minimum and high penalties and high
17 maximums, that this kind of criminal activity be punished
18 severely, and the Court certainly does do that.

19 But be that as it may, the Court has a job to
20 announce a sentence sufficient but not greater than
21 necessary, in its view, under all the relevant circumstances,
22 and that's what the Court is going to do.

23 In any event, the Court will impose a sentence
24 that is going to be serious enough to reflect the criminal
25 activity that we saw here that will be sufficient to promote

1 respect for the law, and it will provide just punishment for
2 the offense. The question is really just how bad the
3 sentence has to be. As high as the Government says or
4 something less? Including, you know, the Court needs to keep
5 in mind, because the Defense has asked for it, the mandatory
6 minimum.

7 On the issue of deterrence, the Court does believe
8 the sentence has to be substantially deterred both in terms
9 of Mr. Frei in particular, but also the public at large. But
10 I do think it is fair to say that in a hypothetical universe
11 where John Q. Public or Jane Q. Public knows what sentences
12 are being imposed out there, although a life sentence may be
13 more flashy, it doesn't mean that the de facto deterrence
14 value would be greater than a very high term of years, for
15 example.

16 The Court also believes, and the statutes suggest
17 this, that for this kind of criminal activity, there is great
18 need to protect the public from further crimes of the
19 Defendant. The issue is how long the term of incarceration
20 has to be. And the Court has to keep in mind the possibility
21 that things like sex offender registration and supervised
22 release can have a role post-release in protecting the
23 public.

24 You know, one answer is, well, we can't be real
25 sure, but I think the Court is allowed to presume they have

1 some value because that's why we have them.

2 These things are expensive. Supervised release
3 and sex offender notification, registry notification
4 regimens, are very expensive and yet they remain in place,
5 and the Court can read some value in reducing the risk of
6 recidivism to that.

7 The Court would also note that this may be a case
8 where -- and I think it -- I'm wondering if there's any way
9 where it could not possibly be anything other than the case.
10 In other words, this has to be a case where compared to
11 younger offenders, the variance from the term of years that
12 the Court could announce would be less of a variance than we
13 would see for younger offenders if the Court was to pronounce
14 a sentence of a term of years.

15 The Court has all these things in mind and wants
16 to comment in some detail about the next issue, the one of
17 sentencing disparities. And one of the things that the Court
18 notes in studying in some detail -- and it's sliced and diced
19 numbers all over the place -- but it wants to note the
20 following about what we see for broad categories of offenses.
21 And the Court is well aware that each offense is different.
22 And it may be that a great number of these offenses are not
23 as serious as Mr. Frei's conduct, but it could be that some
24 are worse, and that's one of the reasons I outlined ways in
25 which the offense kind of could have been worse.

1 So within the broad categories of child
2 pornography, and in the Court's view, really, the -- if we
3 look at what the Sentencing Commission, for purposes of these
4 statistics, would consider child pornography, really, we'd be
5 talking about Count 9 only. The other counts of conviction,
6 it's categorizing as sexual abuse cases which is a different
7 category.

8 For child pornography, in fiscal year 2018, the
9 mean sentence for child pornography in this country was 104
10 months. That's the average sentence, of course. The median
11 is 87 months. For Criminal History Category I, it's 88
12 months and 77 months being the median. So for Criminal
13 History Category I like the Defendant, an average of 88, a
14 median of 77.

15 If we look at sexual abuse cases, for all criminal
16 history categories, the mean months is 191; the median is
17 180. For Criminal History Category I, the mean is 181, and
18 the median is 156.

19 Now, the Court does have these in mind as sort of
20 general guidelines to think about. You know, Mr. Suedekum
21 correctly points out, for example, in the case upon which the
22 Defendant relied, that the -- that's the *Bruffy* case -- that
23 there were definitely worse factors than exist in this case.

24 The Court also notes a couple of other statistics.
25 For child pornography cases, the variance rate is 68 percent.

1 Now, some of those may be upward variances. The Court thinks
2 it would not speak out of school, though, to say that it is
3 likely that most are downward variances because child
4 pornography has high guidelines. But in some cases, I'm sure
5 Courts feel they aren't high enough.

6 In terms of the sexual abuse cases, the variance
7 percentage is 40 percent, so it's not uncommon to have these
8 variances.

9 The Court would also note, when it thinks about
10 the sentence of life that the guidelines suggest, it also
11 looks at a case like *United States vs. Richards* out of this
12 Court, a Sixth Circuit case, affirming a sentence of a term
13 of years where the guideline range was life, the guideline
14 sentence was life. And that is at *United States vs.*
15 *Richards*, 659 F.3d 527.

16 Now, the term of the years there that was imposed,
17 the Court will say ended up being much lower than what the
18 Court is going to impose here. And that's by way of saying
19 the Court has no doubt that even though a sentence of life is
20 the guideline sentence, that a sentence to a significant term
21 of years is an appropriate variance, and the Court will not
22 impose a sentence of life but a term of years that I'm going
23 to discuss.

24 One of the things is -- and I understand that the
25 Government's argument in favor of life, it's the guideline

1 sentence. The Government believes passionately in the case
2 and for punishment and for the other congressional purposes
3 of sentencing, but, of course, the Court's role is different
4 and it's looking at both sides of the equation, does not
5 believe that a sentence of life needs to be imposed in this
6 case. The question is what term of years does need to be
7 imposed.

8 And I will say that it's not surprising that the
9 Defense asked for the mandatory minimum. That would be the
10 kind of thing you might suggest as Defense counsel, of
11 course. The Court believes that that is not high enough, for
12 a variety of reasons.

13 That would start to look at, even based on -- you
14 know, even based on Mr. Frei's current age, you could be then
15 looking at a really major variance, de facto, between a life
16 sentence and the sentence that he would serve, so the Defense
17 doesn't have that just right either. There are a few
18 different ways of looking at what sentence would be
19 appropriate.

20 The guidelines, I want to talk about the
21 guidelines being Level 43. If the five-level enhancement was
22 taken off from the Level 47, we'd be looking at 360 to life.
23 And, of course, I'm talking about an alternative hypothetical
24 guideline calculation and not to diminish from the fact that
25 our guideline sentence is life.

1 But I think that that is not an inappropriate way
2 to think about perhaps a more realistic alternative guideline
3 range, if you will, not taking away the fact of what the
4 guideline range actually is.

5 And I do think that really, the same -- the same
6 reasons why you have the multi-count enhancement which is,
7 you do have multiple crimes, as Mr. Suedekum says, violate
8 various statutes; but it's about the reason -- the way this
9 was charged and tried and convicted, it's about the fact --
10 not just that, you know, one act ended up violating multiple
11 statutes -- it's about repeated conduct, repeated conduct
12 that was, to be sure, predatory, extremely wrongful, hurtful,
13 and the kind of thing that's difficult to think about.

14 But I do think that the substance of the fact that
15 we had repeated conduct in this case towards the victim that
16 was criminal and harmful is essentially adequately accounted
17 for by the four-level, multi-count adjustment.

18 Now, if we think about a guideline sentence of 360
19 to life, I think that's closer to where we need to land. But
20 I am concerned about being quite as high as 360 months. One
21 of them is this, and the parties have not cited sort of how
22 often we have life sentences. But as I say, there are a lot
23 of variances in these cases, and the average sentence, even
24 for the more egregious category of sexual assault cases, is
25 much lower than 360. And so the Court is inclined to believe

1 that 360 is a little bit high.

2 There is a lot of discretion in sentencing. And
3 the Court has looked at this many different ways, and there
4 are a lot of different things that, in the Court's view, are
5 pointing towards a sentence towards the low 300-month range.
6 And a lot of different things when the Court tries to think
7 substantively. One is that the Court does not believe a
8 sentence of more than that is necessary to promote respect
9 for the law, provide just punishment -- that's a severe
10 punishment -- to reflect the seriousness of the offense, or
11 to afford adequate deterrence.

12 But there were numerous aggravating circumstances
13 in this case that make the sentence come in at a level much
14 above what the Defense is asking for. The kinds of things
15 that repeatedly point the Court in the low 300 range are
16 things like if you were to -- when you conceptualize the
17 wrongdoing here, you have a serious component that's more in
18 the nature of the problem being sexual abuse and other
19 aspects of it that are more in the nature of child
20 pornography, and they're each offensive in their own way.
21 And if you were to think about an average or a mean sentence
22 of the two of them put together, you're right around 200
23 months for an average sentence -- excuse me -- 300 months.

24 Also, suppose you were to take a mandatory minimum
25 for child pornography, and the statutory maximum for all

1 offenders, not just ones with the low criminal history of the
2 Defendant, you'd be looking at 27 years which would be in the
3 lower end of 300 months. 300 months is, in terms of a
4 percentage, not a whole lot less than what the Court thinks
5 is a more realistic effective guidelines range.

6 The Court is inclined to think about the -- the
7 notion that in this case -- and again, I understand there's a
8 lot of discretion and it's not like this is a mathematical
9 calculation that you can put together, and it's not like
10 Tennessee state law really has anything to say ultimately
11 about federal sentencing. But the notion that you would
12 have -- if you think about a very severe sentence for this
13 kind of contact offense, which is a predicate offense for the
14 Government, plus a serious and mandatory minimum sentence for
15 child pornography, you would be looking at, hypothetically
16 324 months.

17 And I do think that considering all the factors
18 together, it's not surprising that that view of the situation
19 is indicated by several different measures of the way of
20 thinking about this case substantively.

21 I also think a little bit of credit for the fact
22 that there was some prior incarceration related to the
23 offense of conviction would be appropriate.

24 So in conclusion, over the Government's objection,
25 the Court will grant the motion for a downward variance and

1 will impose a sentence of a term of years. It is not a --
2 despite the way I've talked about slicing and dicing the
3 numbers, the Court does not present this as some mathematical
4 magical calculation; rather, it's where the Court sees
5 several different indications converging for the sentence on
6 a very significant crime.

7 And one final thing I will say is, we have a
8 couple of different things here on the issue of acceptance of
9 responsibility. Mr. Buckholts is correct that their defense
10 was the kind of defense where the one time I've seen someone
11 go to trial in a case I was involved in and get convicted and
12 yet get acceptance of responsibility, it was the kind of
13 offense that we had here, and I understand that.

14 Where the argument really isn't so much about, you
15 know, kind of what happened or Defense counsel wasn't getting
16 their necessary argument that nothing was wrong. I sort of
17 understand that.

18 And yet on the other hand, on balance, we really
19 don't have acceptance of responsibility, particularly in
20 light of a couple of things. The PSR would indicate some
21 incorrect denials from the Defendant about what he was doing
22 and his storing of images.

23 I think Mr. Frei's comments -- which, on balance,
24 I will say did not hurt him. I don't want to think it hurt
25 him to get up and talk, but I still perceive there's not

1 really an awareness of what all went wrong here and why this
2 conduct is so bad and so serious.

3 But I do want to credit the Defense team on this
4 point, and it helped keep the sentence lower than it might
5 have been, for the way they litigated the case, which --
6 which does lend, in part, this notion of some kind of maybe
7 variant of acceptance of responsibility. It also helps for
8 someone that does not get acceptance of responsibility, they
9 don't get up on the witness stand and perjure themselves.

10 That's the kind of thing that helps too.

11 So I have these factors in mind also when
12 considering sentence.

13 All right. So that having said, I've talked at
14 some length, and I've done so because this set of crimes are
15 very serious. The guideline range -- which is, in fact, not
16 a range at all but just simply a sentence of life -- is very
17 serious. The mandatory minimum is very serious. The
18 difference between the parties is very large. There's a lot
19 to talk about. Although I would note that if Mr. Frei was
20 younger, the kind of variance that I'm going to order here in
21 a minute would be a substantially greater variance, most
22 likely, would be the effect of it. At age 47, it's not as
23 great of a variance.

24 And whether it will turn out to be a variance at
25 all, we all hope so. I think no one in here is hoping that

1 Mr. Frei won't serve his sentence, go on to supervised
2 release, and become a law-abiding citizen in a way where our
3 citizens are protected. But, of course, life is uncertain,
4 so we will see -- we will see. But what the Court can say,
5 and it's important, is that the variance is not as great as
6 it would be for a younger person by any means.

7 All right. All that having been said, the Court
8 is prepared to pronounce sentence.

9 And Mr. Frei, it is the judgment of the Court that
10 you shall be committed to the custody of the Bureau of
11 Prisons for a total term of 318 months. And the sentence
12 will be ordered as follows. The sentence on each of
13 Counts 1, 2, 3, 4, 5, 6, 7, and 9, will be 318 months all
14 counts -- excuse me. I said that wrong. My apologies.

15 The sentence on Counts 1, 2, 3, 4, 5, 6, and 7
16 will be 318 months. The sentence on Count 9 will be 240
17 months. All counts will run concurrently.

18 In terms of supervised release, the Court will
19 impose a lifetime term of supervised release on Counts 1
20 through 7 and 9. Not surprising as it's a lifetime term on
21 each count. Those will run concurrently.

22 The fine in this case -- and I'm going to return
23 to supervised release in a moment. The fine in this case
24 will be waived due to the Defendant's financial inability to
25 pay a fine.

1 Restitution will be ordered to the victim in the
2 amount of \$2,080, and I will say that the Court, in making a
3 restitution order, is mindful, in what it puts out there, the
4 fact that it's a minor victim. And so in terms of how the
5 restitution order is written, memorialized, the Court has
6 that in mind.

7 A special assessment of \$800 is mandatory and will
8 be imposed.

9 The JVTA assessment will not be imposed due to the
10 Defendant's indigency.

11 The Court also notes that in this case, there is a
12 preliminary order of forfeiture which will be -- well, I take
13 it back. It's not a preliminary order of forfeiture. What
14 it is, is a stipulation of forfeiture between the parties,
15 and the Court intends and has always treated that as a
16 preliminary order of forfeiture which becomes, under Rule
17 32.2, final as to the Defendant upon his conviction, and that
18 will be ordered as well.

19 I'm going to return to supervised release.

20 Mr. Frei, after release from prison, you will be placed, as I
21 say, on a term of supervised release for life. And the
22 conditions of supervised release are ones that the parties
23 have not objected to on either side, and the Court finds them
24 appropriate under Title 18, United States Code, Section 3583
25 which directs the Court to Section 3553(a) factors

1 specifically applicable to supervised release.

2 What I'm going to do is this: Unless the
3 Defendant waives the reading of these, I'm going to read them
4 all aloud here in court.

5 And I wanted to ask you, Mr. Buckholts: Does the
6 Defendant waive reading, or can I refer by reference to the
7 conditions set forth in the presentence report? It's
8 whatever you want. I don't want to . . .

9 (Respite.)

10 MR. BUCKHOLTS: He would like to waive it, Your
11 Honor.

12 THE COURT: Okay. Very well. Then what the Court
13 will say is, again, absent objection, there are a total of 14
14 different special conditions of supervised release.

15 And Mr. Frei, have you been able to review those
16 special conditions of supervised release and go over them
17 with counsel?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: All right. Any questions about any of
20 them?

21 THE DEFENDANT: Not right now, Your Honor.

22 THE COURT: Okay. Those conditions, at the time
23 of your release, will be reviewed with you by the probation
24 officer, and they will all be included in your written
25 judgment together with the standard and mandatory conditions

1 of supervised release which I'm going to talk about in a
2 minute, so they will all be there for you. They will be gone
3 over by the probation officer, and you can have that
4 discussion at that time if you have questions at that time.

5 The other thing I did want to touch on was that
6 there are 13 standard conditions of supervised release, and
7 for folks in this district placed on supervised release,
8 these are almost always imposed.

9 There are also certain mandatory conditions of
10 supervised release, and I am going to read the mandatory
11 conditions of supervised release. I think that that's
12 probably helpful because it wasn't laid out in the PSR the
13 way the special conditions were. I'm going to read them to
14 you.

15 Then I'm going to ask Mr. Buckholts: The 13
16 standard conditions of supervised release, would you wish for
17 those to be read?

18 MR. BUCKHOLTS: No, Your Honor.

19 THE COURT: Okay. Thank you.

20 I do think we need to read the mandatory
21 conditions aloud since they were not in the PSR. And they
22 can vary a little bit case by case, so I'm going to read them
23 for you. And when I refer to the Defendant, obviously,
24 Mr. Frei, I'm referring to you.

25 Here's how we'll read: The Defendant must report

1 to the Probation Office in the district to which the
2 Defendant is released within 72 hours of release from the
3 custody of the Bureau of Prisons. The Defendant shall not
4 commit another federal, state, or local crime. The Defendant
5 shall not unlawfully possess a controlled substance. The
6 Defendant shall refrain from any unlawful use of a controlled
7 substance. The Defendant shall submit to --

8 Well, let me ask this: Any objection from the
9 Government for waiving the condition of drug testing, given
10 the Defendant's record?

11 MR. SUEDEKUM: No objection, Your Honor.

12 THE COURT: Okay. Very well. Then that condition
13 will be waived. So given your history, you would not be
14 required to do drug testing, but you do need to refrain from
15 unlawfully possessing a controlled substance or using a
16 controlled substance.

17 You shall not possess a firearm, ammunition,
18 destructive device, or any other dangerous weapon, and you
19 shall cooperate in the collection of DNA as directed by the
20 probation officer.

21 And you shall register with the state sex offender
22 registration agency in the state where the Defendant resides
23 or is a student as directed by the probation officer.

24 Finally, I wanted to note again that this will be
25 laid out in your written criminal judgment.

1 Before asking the parties if they have any
2 objections beyond those that have previously been expressed,
3 the Court wants to say it notes that it imposed a sentence
4 substantially higher than the Defense was asking for and
5 something that was not the life sentence the Government was
6 asking for. Based on all the 3553(a) factors, however, it
7 believes that this was the appropriate sentence, considering
8 a variety of often conflicting factors about which way the
9 sentence should go.

10 The Court came out at 318 thinking that a sentence
11 in the range of roughly 27 years with a little bit of credit
12 for sentence served on the prior conviction that implicated
13 relevant conduct was the appropriate sentence in this case.

14 So having said that, are there any objections to
15 the sentence just pronounced beyond those that have
16 previously been expressed? Mr. Suedekum?

17 MR. SUEDEKUM: Your Honor, I think the Court
18 already noted that the United States does object to the
19 variance.

20 THE COURT: Very well. That is noted.

21 Mr. Buckholts?

22 MR. BUCKHOLTS: None that have not already been
23 raised, Your Honor.

24 THE COURT: All right. Thank you very much.

25 The final thing I need to do is advise you of your

1 rights to appeal, Mr. Frei. And, of course, you were
2 convicted at trial and have been sentenced here today. You
3 have a right to challenge your conviction that was sustained
4 at trial, and you have the right also to appeal your
5 sentence.

6 I'm getting that look from our probation officer
7 like there's something that we need to cover.

8 PROBATION OFFICER: Regarding the special
9 conditions, the Probation Office didn't initially include the
10 special condition for restitution because there was no issue
11 of restitution, so I don't know if you want to include that
12 as a special condition. It's not one of those 1 through 14
13 conditions noted.

14 THE COURT: Yeah, and so the standard -- on that,
15 the standard language would be that the Defendant -- well,
16 the Defendant shall -- I'm trying to think what you have
17 versus "not" at the end there. There is the condition
18 already about financial disclosure, but it would be that --
19 is it the standard language that the Defendant shall make
20 restitution?

21 PROBATION OFFICER: I believe it's like 10 percent
22 of his gross income or it will start as part of the Bureau of
23 Prisons program.

24 THE COURT: Yes. Yes, where the language is, you
25 know, hey, while you're on supervised release, you are

1 required to make progress towards the payment of any
2 restitution or special assessment. But you are expected to
3 make payment from any earnings in prison employment programs.

4 Do you know the condition I'm talking about,
5 Mr. Buckholts?

6 MR. BUCKHOLTS: I'm somewhat aware that -- my
7 understanding is -- I couldn't cite you the provision, but
8 where somebody is working and they get -- there's a -- some
9 percentage that gets taken of their income to go towards any
10 special assessment or fines or restitution.

11 THE COURT: Exactly.

12 MR. BUCKHOLTS: Am I correct on that -- on that,
13 at least the substance of what the rule is? I can't even
14 cite you the exact rule there.

15 THE COURT: All right. Very well. And I wish I
16 happened to have a copy of the words that are typically used
17 in the condition.

18 PROBATION OFFICER: I do happen to have it here.

19 THE COURT: Okay. Yeah, if that could be handed
20 up, that would be great.

21 All right. The question being should this be
22 included with the 14 we already have. So Mr. Frei, here is
23 the proposed additional condition of supervised release.

24 "You shall pay restitution in an amount totaling
25 \$2,080 to," and it would make a reference to the minor victim

1 in this case. The victim's address will be provided to the
2 Clerk of the Court under separate cover. Payment shall be
3 submitted to the Clerk, United States District Court, 801
4 Broadway, Nashville, Tennessee, 37203. While incarcerated,
5 payment shall begin under the Bureau of Prisons Inmate
6 Financial Responsibility Program. Should there be any unpaid
7 balance when supervision commences, you shall pay the
8 remaining restitution at a minimum monthly rate of 10 percent
9 of your gross monthly income. No interest shall accrue as
10 long as you remain in compliance with the payment schedule
11 ordered. Pursuant to Title 18, United States Code,
12 Section 3664(k), you shall notify the Court and the United
13 States attorney of any material change in economic
14 circumstances that might affect ability to pay.

15 So that's the proposal. So Mr. Buckholts, if you
16 want to discuss it with Mr. Frei, you can talk about it.

17 (Respite.)

18 MR. BUCKHOLTS: That's fine, Your Honor.

19 THE COURT: Okay. Absent objection, that will be
20 ordered as special condition 15.

21 So since I have technically altered my
22 pronouncement of the sentence, are there any objections now
23 beyond those that have been previously expressed to the
24 sentence in full as it has been ordered? Mr. Suedekum?

25 MR. SUEDEKUM: None other than those already

1 stated, Your Honor.

2 THE COURT: All right. Thank you.

3 MR. BUCKHOLTS: Judge, there's one other thing.

4 We'd asked for a recommendation that he be placed at the
5 Bureau of Prisons in -- for sex offender treatment.

6 THE COURT: I should make sure I have all your
7 recommendations, and I will say this: What I was thinking
8 was that, you know, there is some language in your brief that
9 the Court might use in making that recommendation. But I do
10 understand the gist of it is that there may be two different
11 levels of sex offender treatment programs in prison. You
12 would like placement, regardless of location, to a location
13 that can get him ideally the top-level program, and failing
14 that, a location that has the ability to provide him the
15 second level program; is that right?

16 MR. BUCKHOLTS: That's correct, Your Honor.

17 THE COURT: Okay. All right. That will be
18 included. And just to make sure, any other recommendations?

19 MR. BUCKHOLTS: I think that was it, Your Honor.

20 THE COURT: Okay. Thank you.

21 So what I'm going to do then is advise you of your
22 rights to appeal, Mr. Frei, and then make a couple of final
23 remarks about a case that for different reasons, for
24 different folks, was difficult for all.

25 You have the right to appeal your conviction and

1 your sentence, but any appeal needs to be initiated by a
2 Notice of Appeal which must be filed within 14 days of the
3 time the written judgment is issued in this case, which we
4 expect to be in the next few days.

5 If you do not file a Notice of Appeal within 14
6 days of that time, you could and likely would waive your
7 right to appeal. So if you're interested in appealing your
8 conviction and/or your sentence, speak with Mr. Noel and
9 Mr. Buckholts about it, and if you direct them in clear terms
10 to file a Notice of Appeal, they would be obligated to do so.

11 Also, because you are indigent, the Clerk of this
12 Court could file a Notice of Appeal for you on your behalf,
13 but after all, that's what your current counsel are here for.

14 You would have the right to apply for permission
15 to appeal without paying court costs due to your indigent
16 status, if you believe you still have indigent status. And
17 for any period of time in which you have indigent status, you
18 would have the right to Court-appointed counsel paid for at
19 public expense, and you can apply for that if you appeal.

20 Any questions about your right to appeal?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: All right. Thank you.

23 I wanted to make a couple of remarks about counsel
24 for the Defense. These are difficult cases given their
25 nature. For reasons we've all been talking about, these are

1 very serious cases that -- that provoke very negative
2 reaction in people for understandable reasons. The system
3 relies on Defense counsel being willing to take these cases
4 and defend those who have been accused of these things,
5 because until we have a conviction, we don't know if there's
6 any validity to these allegations or not, serious though they
7 may be. And so the Court relies on Defense counsel willing
8 to take these cases and litigate them, and the Court does
9 wish to commend Defense counsel for being dealt a difficult
10 hand here in terms of the facts and the law and the statutory
11 maximums and the mandatory minimums and doing their very
12 best, being experienced counsel, and putting the best foot
13 forward for the Defense.

14 The Court is not going to say more than that
15 because it's not appropriate to comment on, you know, the
16 quality of the defense, and that's not what I mean to do
17 because that's not really my role. But what I can say is
18 that the Court appreciates experienced counsel coming in here
19 and litigating the case the way it has been litigated here,
20 and certainly litigating it in good faith.

21 And if the Court may say so, the Court perceives
22 Defense counsel's interests in trying to keep the attention
23 on those areas that were in dispute where they can make
24 potential progress for their client rather than wasting the
25 Court or the Government's time. At least that's my

1 perception and I hope that's the Government's perception as
2 well.

3 But in -- the final point is, the Court is
4 appreciative of counsel who are not making millions off of
5 cases like this representing indigent Defendants, doing this.

6 All right. This has been a very serious case.

7 We've talked at length here this afternoon because the
8 consequences of this case, these charges, these convictions,
9 these statutory range of penalties is so severe.

10 Is there anything further we need to discuss at
11 this time?

12 MR. SUEDEKUM: No, Your Honor.

13 MR. BUCKHOLTS: No, Your Honor.

14 THE COURT: All right. Thank you, Counsel. We
15 stand in recess.

16 (WHEREUPON, the foregoing proceedings were
17 concluded at 5:21 p.m.)

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1 **REPORTER'S CERTIFICATE**

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3 I, Deborah K. Watson, Official Court Reporter for
4 the United States District Court for the Middle District of
5 Tennessee, with offices at Nashville, do hereby certify:

6 That I reported on the Stenograph machine the
7 proceedings held in open court on January 13, 2020, in the
8 matter of UNITED STATES OF AMERICA vs. JAMES FREI, Case No.
9 3:17-cr-00032-1; that said proceedings in connection with the
10 hearing were reduced to typewritten form by me; and that the
11 foregoing transcript (pages 1 through 97) is a true and
12 accurate record of said proceedings.

13 This the 27th day of March, 2020.

14

15 /s/ Deborah K. Watson
16 DEBORAH K. WATSON, RPR, CRR, LCR
17 Official Court Reporter